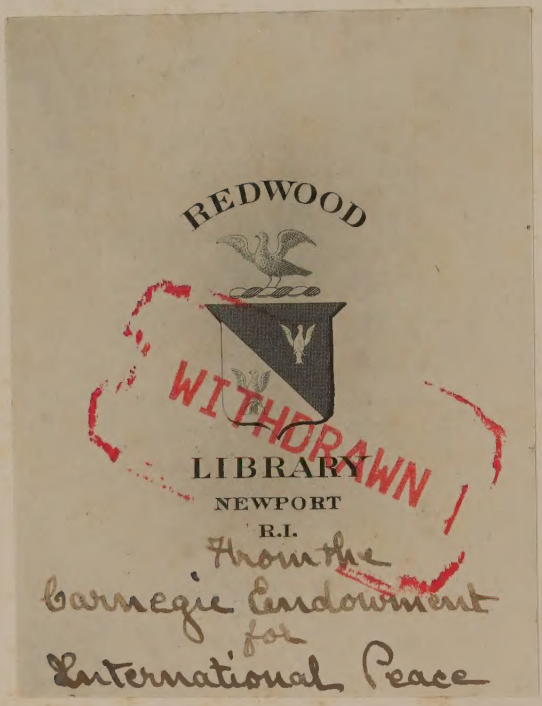
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THE INTERNATIONAL UNION OF THE HAGUE CONFERENCES

BY

WALTHER SCHÜCKING

Carnegie Endowment for International Peace
DIVISION OF INTERNATIONAL LAW
James Brown Scott, Director

THE INTERNATIONAL UNION OF THE HAGUE CONFERENCES

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INTRODUCTORY NOTE BY THE DIRECTOR

In the spring of 1912 there was issued, in the German language, a book entitled *Der Staatenverband der Haager Konferenzen*, or, as it may be rendered in English, *The Union created by the Hague Conferences*. This work is the first of a series of volumes under the general title *Das Werk vom Haag*, or *The Work of The Hague*, published by Messrs. Duncker and Humblot of Munich and Leipzig, and due to the enterprise and devotion of Dr. Walther Schücking, professor in the University of Marburg, Germany. The series, as a whole, was intended to make known the results of the First and Second Hague Conferences by publishing monographs dealing with the declarations, conventions, and recommendations, as well as the problems of the Conferences, so that the students and scholars of Germany might be furnished with all information essential to a correct understanding of the Conferences.

In the conduct of this enterprise Professor Schücking has secured the co-operation of the following well-known publicists: von Bar, Fleischmann, Kohler, Lammasch, von Liszt, Meurer, Niemeyer, Nippold, von Ullmann, and Wehberg. Thus far two volumes of the series have been issued, viz., the volume by Professor Schücking referred to above, and one by Dr. Hans Wehberg, entitled *Das Problem eines internationalen Staatengerichtshofes*, or *The Problem of an International Court of Justice*. A third work in three volumes, entitled *Judicial Decisions of the Permanent Court at The Hague*, is in process of publication, being a careful and accurate account of the cases which have been tried

by temporary tribunals formed from the Permanent Court since its establishment in 1902.

It was but natural that Professor Schücking, the founder and editor, should contribute the first volume, in which he attempts to define the nature and scope of the Hague Conferences, the place they occupy among other conferences, and the probable form which they may assume. Professor Schücking's views may be briefly stated. He believes that a definite political union of the states of the world has been created by the First and Second Conferences, that the various agencies created by the Conferences are not merely agents or organs to carry out the purposes for which they were created, but that they are agents or organs of the union; that is to say, the so-called Permanent Court of Arbitration is not merely the agency of the two or more parties constituting the special or temporary tribunal for the trial of an individual case, but that the court and its tribunal are in fact the organ of the union and administer justice not merely in the name of the parties constituting the tribunal, but in the name of the states forming the union. This is, indeed, a radical conception, but it is a logical deduction on the assumption that the union of the states, of which the Hague Conferences are the evidence, is a political and organized union. The undersigned, however, prefers to consider the union, in so far as the administration of justice is concerned, as a public union, of the type, for example, of the Universal Postal Union.

After a careful discussion of the nature of the Conference, the services which it has rendered, and will undoubtedly render if it be held at regular stated intervals—ten years, in his opinion, would be often enough,—the author proposes that the Third Conference adopt a convention defining the aim and purpose of the Conference, the period at which it

shall meet, the procedure to be followed by it in the conduct of its business, and the details necessary to perfect its organization. The provisions of the draft convention which he proposes are in the nature of a codification of the practice of the nations, in so far as the Hague Conferences are concerned, and do not express the author's views concerning the probable or desirable development of international organization. His personal views are contained in Chapter V, and, whatever may be thought of the correctness of his point of approach and the conclusions which he reaches, there can be no doubt that the *Staatenverband der Haager Konferenzen* is not only an admirable introduction to the series of volumes and monographs to be devoted to the work of The Hague, but is also a distinct contribution to one of the most important and hopeful phases of international life.

JAMES BROWN SCOTT,
Director of the Division of International Law.

WASHINGTON, D.C.,
June 28, 1917.

PREFACE

In studying the problem of obligatory arbitration the author became impressed with the conviction of the extent to which the proper solution of a separate problem of that kind is at the present day dependent upon the fact that a clear idea shall first have been obtained of the direction which the Hague work as a whole has given to the development of international law. Neither the diplomats of the Hague Conferences nor the specialists in the theory of international law have thus far studied in detail this cardinal question.

As a result of his investigation of this problem the author arrived at wholly new conclusions. But this fact has not troubled him. He who brings new ideas to light must in the nature of things stand at first alone. And this isolation will, in Germany, be all the greater in an age such as ours. The view which Nietzsche was the first to present strikingly, that the period of German unity and economic impetus must be followed by an unfortunate setback in the intellectual life of Germany, is admitted as just by many persons at the present day. The voluntary barriers which a decadent age has set for itself in respect to its ideas and its ideals must also have a fatal influence upon the German science of international law. But already the spring winds of a new age are blowing abroad, and those who hold to the ' ideas of 1875 ' are everywhere being forced to defend their position. Thus it has now become possible to obtain recognition for new standards in international law as well.

It is true that the unfortunate political events of the past year have called forth in me serious doubts as to my individual attitude with respect to the value of the work of The Hague—doubts which to some extent persist down to the present day. Indeed, while I was writing this book there came into my mind many a time a sad story which is often told in Münster, the city of my birth. There lived there a leader of the Anabaptists who shortly after the founding of the 'millennium' withdrew into solitude in order to write a great work in which he might portray to his contemporaries the grandeur of this ideal state and propagate its theories. But when he came out again before the populace, his face beaming with satisfaction upon the completion of his work, he found that the millennium had become a reign of terror and of wild disorder. In like manner let the author who writes his books from the heart, and who makes it his ambition to take a conscious part in the progressive development of his country and of all mankind, beware of a like experience.

But while in such hours of doubt I did not, like Luther, throw with success an ink-well at a real devil, yet I nevertheless became master of these doubts; nay, the political events of the last year have in the end merely served to strengthen my views upon the international development. The scholar has both the privilege and the opportunity of considering such phenomena *sub specie aeternitatis*; he puts them in their proper place in the progress of historical development, but he does not fail to look beyond them to the great ultimate goal of this development. He knows rather that, as the great Heraclitus so well said, nothing on earth exists, but all is in evolution and that this evolution is only accomplished after a thousand struggles, and that temporary disappointments and reactions are not the excep-

tion but the rule. And with the jurist it is a question not only of recognizing and presenting things in their historical connexion, but of drawing up rules and influencing conduct. Consider merely how quickly the new rules which Hugo Grotius laid down under the influence of the Thirty Years' War, in order to put a check to the fury of armed combat, obtained practical validity. Accordingly the more unsatisfactory conditions within the international community are at the present day, the more brutal the way in which might openly triumphs over right at the present day, the more must the international law jurist endeavour to point out to mankind the ways and means which will lead it out of the dark valley of the past up to the bright heights of the future. But if under the gloomy impressions of recent years we ask ourselves where we shall find a basis for our labours in order to bring about a better age when peace shall be secured through law, there can be but one answer—in the work of The Hague.

It is a question of estimating at its full significance what has been done at The Hague and of developing it still further. The stately Peace Palace, which has been built there by a thousand industrious hands, is merely the symbol of a new age. There is now to be built by a thousand intellects the invisible palace of law and justice under whose protecting roof the whole civilized world shall live together in peace. Here again it is a matter of laboriously placing one stone upon another until the whole structure towers in the heavens for all time, like the noble structures of the pyramids. Who knows to-day the individuals who took part in building them ? So also shall be forgotten the names of those who have laid the invisible monument of peace and law. Which of them shall live to see the day when the last stone of this monument shall be laid ? And

yet who can measure the joy of those who have rendered even menial service in its construction? For no princely whim is building it, but mankind itself without distinction of country, of faith, of race, or of sex. And it shall not be a resting-place for the dead, but a place where the living may work and create without constant danger lest one day their own blood or that of their loved ones shall stain the green soil. Already the foundations of this building have been laid, deeper and stronger than thou dost suspect. Is its completion to be in reality a Utopia? As Euripides says:

> In faith and fortitude another truth I hold:
> Good more than ill at length throughout the world prevails;
> Were it not so, what man could live his life?

WALTHER SCHÜCKING.

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INTRODUCTION

THE SCIENCE OF INTERNATIONAL LAW AND PACIFISM

When at some future time the history of the science of international law in Germany shall be written, the historian will not fail to note that in the development of this branch of science the year 1907 stands out as a landmark. For in that year the pacifist spirit made its way into the German science of international law, never, it is hoped, to desert it hereafter. It is true that early in the year 1906 there appeared Meurer's valuable and comprehensive statement of the law of peace of the First Hague Conference, which was, as it were, an anacrusis to the new movement. To a careful scholar like Meurer the influence of the peace movement and of the leading personalities of this movement upon the current of events at The Hague could not remain hidden; he frequently cited the Journal[1] of Baroness von Suttner, 'that noble woman,' who was referred to as a droll figure by another German professor of international law, and he asserted that she 'by her active and friendly intercourse in the circle of ambassadors and ministers had followed the work of the Conference with understanding and sympathy'. He spoke of her salon as the meeting-place of all persons interested in the cause, of ambassadors, journalists and reporters, and cited with hearty approval the words of Fried: 'What Suttner, Bloch, and Stead accomplished in those days belongs to

[1] *Die Haager Friedenskonferenz*, Journal of Bertha von Suttner. 2nd ed. Dresden and Leipzig, 1901.

history.'[1] It is evident, therefore, that he regarded the convention relating to arbitration as the most important fruit of the pacifist movement. But on the whole he is very sceptical in regard to the further aims of this movement, and, as is consistent with the general character of his book, he avoids taking a fundamental position with regard to the prevailing method of international law. This position was, in my opinion, first worked out by Nippold and myself independently of each other. After many years of study upon the subject I wrote, in the spring of 1907, a concise essay with the professed object of helping to bring about a new era of international law, and in order to give the essay the widest circulation possible, I had it published in the *Zukunft*.[2] In this essay, after a criticism of the historical school of political science, I showed that by this attitude:

> Jurists had lost the leadership not only of the social world but also of the international world. . . .
>
> What political economists, philanthropists, princes of the Church and statesmen have done for the development of law in the field of social science, the pacifists must do in the field of international law. It is high time for German science, instead of regarding their efforts disdainfully, to accept the stimulating influence of their example.

At that time in Germany his appeal was like the voice

[1] Meurer, vol. i, pp. 25, 26. I refer to the attitude of Meurer towards Baroness von Suttner because it is characteristic of the progress of international law, just as a true anecdote can light up the history of a whole period.

[2] See *Die Zukunft*, 1907, no. 46, p. 244 et seq. The essay in question later became, with slight changes, the introduction to my *Organisation der Welt*, which appeared in the year 1908 in the memorial volume to Laband, and in the year 1909 was published in Leipzig as a separate book. See the same, p. 5 et seq.

of one crying in the wilderness. But sooner than he anticipated the author of those words received powerful support, which to be sure came in a characteristic way not from political quarters, but from the intellectual circles of Germany. Indeed, shortly before that article and in the same year, 1907, appeared the epoch-making book of the Berne scholar Otfried Nippold, *Die Fortbildung des Verfahrens in völkerrechtlichen Streitigkeiten* [The development of procedure in international disputes].[1] In this volume Nippold not only demonstrated, to be sure without assigning the underlying reasons, the backwardness of German science, the fact that it ' does not venture to look into the future ',[2] that it simply ignores the great intellectual work which the pacifists have done for the development of international law, but in a criticism of the existing methods, extending over almost 700 pages, he shows how in the case of a special branch of international law, which is at best in the making, the science of international law must be brought to its fulfilment in our day. What has been done by the pacifist efforts of foreign scholars and publicists and by the resolutions of peace congresses for the development of legal science is here set forth in an admirable way, in so far as it bears upon his subject. In 1908 followed my study entitled *Die Organisation der Welt* [The Organization of the World],[3] which was composed in the summer of 1907.

[1] The book was published before the opening of the Second Hague Conference on July 15, 1907, but did not come into my hands until the late fall after the publication of my article.

[2] See the Introduction, p. 3.

[3] See p. 2, note 2, and consult also in this connexion the works of my pupils, in particular that of Schwitzky, *Der europäische Fürstenbund Georgs von Podĕbrad, ein Beitrag zur Geschichte der Weltfriedensidee*, Marburg, 1907; and E. H. Meyer, *Die staats- und völkerrechtlichen Ideen von Peter Dubois*, Marburg, 1908; other studies by my students in this connexion

Since that time pacifism has had a secure position in German legal science.[1] It gave me the greatest pleasure to read in the year 1909 in the preface of Baron von Stengel's book, *Weltstaat und Friedensproblem* [World State and the Peace Problem], the following words:

> In addition it should not be overlooked that in recent years a number of German university professors have devoted themselves to the peace movement with great energy, or have to a greater or less extent taken an attitude of approval towards it.[2]

The intention of Baron von Stengel to offset by his book the new tendency can hardly be said to have succeeded.[3] Max Huber has recognized that modern pacifism

are in preparation. In addition I have for several years given a special public lecture at the university of Marburg upon the idea of international organization and the significance of the Hague Conferences, which is attended by 200–300 students of all faculties.

[1] Of course we are speaking of the modern constructive pacifism, if I may call it by that name, the programme of which is set forth, so Huber says in his essay, *Die Gleichheit der Staaten* (one of the legal contributions in the foreign memorial volume to Kohler), Stuttgart, 1909, p. 88 et seq., in Fried's work *Die Grundlagen des revolutionären Pazifismus*, Tübingen, 1908, and in my above-mentioned work, *Die Organisation der Welt*. L. Oppenheim has recently written along similar lines in his *Die Zukunft des Völkerrechts*, Leipzig, 1911. The valuable works of Hans Wehberg are referred to below. Likewise the historical development of pacifist ideas will be further spoken of below. I merely observe here that Fried's term ' revolutionary pacifism ' seems to me inappropriate, and I would like to see the term ' constructive pacifism ' substituted for it.

[2] Op. cit., Preface, p. x.

[3] In his brilliant essay *Die Friedensbewegung und das Völkerrecht*, in pt. iv of his *Zeitschrift für Völkerrecht und Bundesstaatsrecht*, p. 129 et seq., Kohler justly observes with regard to von Stengel's work : ' It contributes nothing which in any way brings a new problem under discussion or throws new light upon the subject.' Kohler analyses in an admirable way all the objections which have thus far been brought against the peace movement or against its adherents. In spite of Stengel's wholly reactionary

has become as it were the law of nature for international law.[1] But we know that the law of nature did not by any means let itself be defeated, and it is a matter of daily experience that the claims of the natural law are, through the development of the positive law, transformed into the existing rules of law.[2] The pacifist tendency of the science of international law will, however, have a special advantage in the fact that precisely at the present day in Germany the historical school has been driven to take the defensive and forced to make concessions in favour of a more philosophic tendency. And the sooner the leading minds of our country succeed in introducing a new era of German idealism, the sooner will this intellectual movement take possession of legal science and point out to existing international law new lines of development. In the year 1910 Zorn also attested that the 'international peace movement is without any doubt daily making great and unmistakable progress with nations and governments, in the press and in parliaments, in the superficial manifestations

point of view in the science of international law he was persuaded in the winter of 1910–11 to deliver an address upon the peace problem in the 'Political Science Courses for the Prussian Administrative Officials' at Berlin.

[1] In his essay, *Beiträge zur Kenntnis der soziologischen Grundlagen der Staatengesellschaft* (*Jahrb. des öffentl. Rechts*, vol. iv, p. 56 et seq.), in particular at p. 120 et seq., Max Huber gives a valuable estimate of pacifism and of its influence upon international law.

[2] Jellinek, in the chapter *Staat und Recht*, in his work on the General Theory of the State, makes some interesting observations on the manner in which the law of nature has become steadily more positive in character. In my treatise, *Das Nationalitätenproblem*, Dresden, 1907, I have pointed out that the present middle classes in Germany, which owe their whole legal position to the natural law, deny the existence of the natural law with respect both to the workingman (e.g., the law of work, i.e., insurance of the unemployed) and with respect to national minorities (e.g., the question of languages).

of the so-called public opinion and in the difficult scientific work of international law'.[1] And he further says that pacifism and the institutions connected with it, e.g., the Interparliamentary Union, has been the guiding spirit in pointing out the importance of placing arbitration upon a firm and legal international basis and the value of a truly permanent arbitration court for the maintenance of world peace. It is especially due to the vigorous propaganda of pacifism that the idea of international arbitration has become the common property of public opinion, at least outside Germany.[2] In the same year Wehberg wrote :[3]

> Care must be taken not to consider the Peace Conferences apart from their connexion with that great idea to which they owe their origin, namely, the peace movement.

Naturally there are occasional instances of a reactionary attitude. Among them I count, for example, the recent book by Pohl, *Deutsche Prisengerichtsbarkeit* [German Prize

[1] In the memorial volume to Güterbock, Berlin, 1910, p. 197. 'Even the bloody wars and battles which the first decade of the new century has experienced have not been able to hold back one moment the progress of the international peace movement.' Zorn then goes on to speak, it is true, of the many and self-destructive Utopian schemes of the peace movement.

[2] It would be truly fitting if German legal science were to express publicly the great service which pacifism has rendered in the development of international law by conferring the degree of honorary doctor of laws upon one or other of the leaders of that movement. No one, in my opinion, would be more worthy of that honour than A. H. Fried, the recipient of the Nobel prize and the editor of the *Friedenswarte*, and the last university jubilees would have offered an excellent opportunity for it.

[3] In the introduction of his edition of the text of the Hague Conference, 1910, p. 31. See also Wehberg's suggestive work, *Die internationale Friedensbewegung*, pt. 22 of the *Staatsbürger-Bibliothek des Volksvereinsverlags in München-Gladbach*.

Law]. It is a pity that so young, industrious, and thorough a writer pulls in the old harness. Pohl writes as follows upon the method of international law:

> It seems to me that the more conservative method in the science of international law is the one which deserves the preference, at all events it must be given a higher place of honour than formerly. The solution must for a long time be: Back to Georg Friedrich von Martens.[1]

The reference to Georg Friedrich von Martens, who was for a long time a partisan of the historical school founded by his Göttingen colleague, Hugo, and who caused the strictly positivist method of international law to prevail, seems to me quite like asking the theologians, on the occasion of the dispute over Jatho and Traub, to refer to Martin Luther. Undoubtedly Luther was a man in whose honour certainly nothing further need be said, but can his theory help us Protestants out of difficulties which have arisen from new knowledge and new conditions? Each method is conditioned by the times.[2] We are in the age of the telephone and of wireless telegraphy, an age in which international law has entered upon a very rapid

[1] Op. cit., Tübingen, 1911, p. 9.

[2] Consider, for example, how immediately after the founding of the German Empire public law needed neither an historical nor a legal-political, but a dogmatic method of treatment, which threw light upon the wholly new law which had come into force. The value of Laband's work consists in the excellent manner in which he was able to meet this need of the times. Jellinek's *Allgemeine Staatslehre*, which appeared just at the close of the century, marked already the return to a philosophical investigation directed towards the state as a type. In the future political science will, in view of the imminent constitutional changes (for example, the necessity of imperial ministers, the urgent changes in the Prussian electoral law), turn from the philosophical foundations laid down by Jellinek back to the tasks, at once legal and political, of the *lex ferenda*, if it is to answer the needs of the day.

development. The man who recommends to the international jurists of to-day a conservative positivism has failed to understand the problems which this very age of ours presents to the science of international law. Pohl is an example in point.[1] In the year 1907, as I said above, Nippold's book upon the Development of Procedure in International Disputes appeared. It was at that time, undoubtedly, by far the most advanced book of the German science of international law in that field. But this book, as Pohl will concede, has already been left behind on important points by the actual results of the Second Hague Conference held in the same year, e.g., the results with respect to the Judicial Arbitration Court and the International Prize Court. Even at the present day the development is so rapid that the delegates themselves of the Hague Conference are, according to their own words, continually surprised by it.[2] Now the most important problem for us international law jurists is that of co-operating in this development. But he who will do so must necessarily take his cue from the pacifists. For no one can seriously

[1] Pohl's assertion that 'if at the present day in Germany the science of international law does not stand upon the high plane which the other branches of jurisprudence have reached, that is to be put down not least of all to the fact that many, by looking solely at the future, fail to see the present', affords me very natural amusement. Where are these international jurists who have their eyes fixed on the future? In all the German universities I know of but one, namely, Professor Walther Schücking of Marburg. Whether his tendencies are responsible for the backwardness of the German science of international law, a fault which, indeed, has already been overcome, is a question which Pohl may leave it to others to answer.

[2] In his memorial volume to Laband, *Die Fortschritte des Seekriegsrechtes durch die zweite Haager Friedenskonferenz*, p. 179, Zorn speaks of the Prize Court as follows: 'Even the boldest expectations of theory and the resolutions of the Institute of International Law remain far behind what . . . international law is now to be.'

dispute the fact that the development of international law has, since the First Hague Conference, been along the lines of modern organized pacifism.[1] And this problem of indirect co-operation in international legislation at the same time holds our interest more and more. The problem of the law of the future has always been more interesting to jurists than the dogmatic rules of the law of the present. Ideals will, to be sure, have great influence upon the law of the future, and they will be progressive ideals. It is precisely an ideal which the German of to-day lacks. But it is to be hoped and presumed that the lack will not continue for ever.

[1] In his treatise on the Equality of States, p. 88, Huber, for example, in spite of his personal opposition to this movement is forced to state that the Convention relative to the International Prize Court and the draft Convention relative to the Judicial Arbitration Court, adopted at the Second Hague Conference, have been built upon the basis of modern revolutionary, or, to use a better term, organized pacifism. Accordingly the majority of the members of the Second Hague Conference, knowingly or unknowingly, already stood upon that ground.

CHAPTER I

THE COMMUNITY OF STATES BEFORE THE HAGUE CONFERENCES

The tragical conflict between father and son, who can never quite understand each other because they represent the ideals of different generations which are in conflict one with the other, is not limited to families, but is seen in the larger field of the world's history. Here where the battle between two epochs is wont to be protracted for centuries and even then is not entirely fought out, the disposition to fight remains likewise for centuries after and prevents a just and objective judgment. It is asking a good deal of a Protestant that he shall take into account the wonderful influence upon culture which the Catholic Church has exercised in the past, when he is forced at the present day to face another Borromean encyclical! But as in the life of the family the son is followed by the grandson, who can estimate without prejudice the real value of the ideas of the grandfather, so in the history of the world there always comes a time when we can sit in judgment upon a period long gone by with less prejudice than upon the age immediately preceding us. In my opinion that is possible at the present day with regard to the idea of the Middle Ages of a universal empire. Thus far it has been common especially in international law to speak of the great liberating days of the Renaissance, which, as the beginning of the modern era, first gave us in the co-existence of independent states the trunk upon which these branches

of law have been able to grow. But persons have failed to recognize that this co-existence of independent states first resulted for a hundred years in a condition of things which may be described, *mutatis mutandis*, by the expression *homo homini lupus* used by Hobbes to describe the condition of individual men before the formation of the state. Whereas the Middle Ages with their principle of unity looked upon peace as the aim of God upon earth,[1] the modern era of disorganization advanced the idea that war—'the most bestial folly of mankind' as Leonardo da Vinci always called it—should be recognized and honoured as a 'part of the divine arrangement of things', and when Christians have massacred one another thoroughly they receive even at the present day upon the battle-field as their reward a medal bearing the emblem of the cross upon which the Founder of the religion of love died![2] That is the dark side of the fall of the imperial system of the Middle Ages. Nevertheless facts are stronger than men, and the very necessity of things brought it about that, just as history drew together individuals, or rather their tribes (for as we know now the individual has never lived wholly for himself),[3] so the states which were free

[1] See my treatise, *Die Organisation der Welt*, Leipzig, 1909, p. 17 et seq.

[2] The involuntary irony of this inconsistency was first pointed out by the Rev. Nithack-Stahn in his address upon Christendom and the Peace Movement at the Universal Congress for Free Christendom, in 1909.

[3] In opposition to the above view that states were developed gradually from previous social communities, Eduard Meyer, in his *Geschichte des Altertums*, 2nd ed., 1902, vol. i, chap. 1, 'The Development of the State,' advances the theory that the state is the oldest form of social union, older than the family, and older even than man, since it constitutes the condition for the existence of the human species and corresponds to the grouping of animals into herds. In the beginning of history, he says, there were political regulations imposed especially upon the tribal unions,

and without connexion with one another formed themselves into a community. Before the time of Hugo Grotius the Jesuit, Francisco Suarez,[1] who lectured as professor in Segovia, Valladolid, Rome, Alcalá, Salamanca and Coimbra, had already eloquently expressed the idea of the community of nations.[2] Grotius then took up this idea of the legal community of states and led it to victory, while Pufendorf and his school even desired to deduce from the idea that states stood towards one another in the position of moral persons under the authority of law, the

which regulations to be sure disappeared in the transition to a settled life. The idea of the state can thus be traced back to a very limited field, where it gathers new strength and then again pushes on to victory. In my opinion Meyer's theory is rather a problem of anthropology than one of political science. For in the view of political science the development of the state first begins with a settled manner of life, and we jurists with our concept of the state cannot look upon the previous tribal organization as in any way constituting a state.

[1] b. 1548, d. 1617.

[2] The oft-cited passage from his book *De legibus ac Deo legislatore*, Coimbra, 1612, reads as follows : *Ratio huius iuris (scilicet ius gentium) est, quia humanum genus, quamvis in varios populos et regna divisum, semper habeat aliquam unitatem non solum specificam, sed etiam quasi politicam et moralem, quam indicat naturale praeceptum mutui amoris et misericordiae, quod ad omnes extenditur, etiam extraneos et cuiuscumque nationis. Quapropter licet unaquaeque civitas perfecta, res publica aut regnum, sit in se communitas perfecta et suis membris constans, nihilominus quaelibet illarum est etiam membrum aliquo modo huius universi, prout genus humanum spectat. Nunquam enim illae communitates adeo sunt sibi sufficientes sigillatim, quin indigeant aliquo mutuo iuvamine et societate ac communicatione, interdum ad melius esse maioremque utilitatem, interdum vero ob moralem necessitatem. Hac ratione indigent aliquo iure, quo dirigantur et recte ordinentur in hoc genere communicationis et societatis. Et quamvis magna ex parte hoc fiat per rationem naturalem, non tamen sufficienter et immediate quoad omnia : ideoque specialia iura potuerunt usu earundem gentium introduci.* I quote from Rivier in Holtzendorf's *Handbuch*, vol. i, p. 39. See Rivier, op. cit., p. 393 et seq., also in respect to the statements following.

conclusion that the provisions of the natural law with regard to the relations between individuals were of themselves binding upon states. This idea of the identity of the *ius gentium* and of the *ius naturale* has fortunately been overthrown since the time of Christian Wolff; but the idea of the legal community of states, upon which alone international law can be based, was naturally retained and even emphasized by persons who traced back the idea to the *civitas gentium maxima*, the world state. This *civitas maxima* was with right expressly rejected by Wolff's celebrated pupil, Emer de Vattel, who substituted for it the somewhat colourless expression, 'the society of nations'. As a matter of fact, although the world state, now in the republican form, must be built up upon the co-existence of legally equal states, the community of nations remains unorganized down to the present time, a community but not a commonwealth—and indeed, as has been said, an unorganized community. International law rests, as Holtzendorf observes, upon the union of three conditions: (1) Upon the co-existence of a number of independent states; (2) upon the fact of an intercourse between these independent states which is regulated and permanent; (3) upon the agreement of these states mutually to recognize one another as subjects of law within the circle of their community.[1] Thus far, however, the legal community of states has lacked a legal organization. Accordingly it is better to speak of a society of states rather than of a union

[1] Holtzendorf, op. cit., vol. i, p. 6. Anschütz, in his exposition of German public law in the Holtzendorf-Kohler *Enzyklopädie*, makes a similar statement: 'The foundation of international law is at bottom a social phenomenon, a community between the states. . . . But this community between the states is not organized into a collective personality endowed with universal authority. It is a community, but not a commonwealth.'

of states.[1] For taking the word 'union' in its ordinary sense, one understands by a union of states a legal organization. On the other hand, we use the word 'society' especially in those cases where we meet with a group whose members are bound together by a common motive of any kind whatsoever.[2] There are social groups which are legally organized, just as a student body can have the legal position of an incorporated association; and there are social groups, which, like the so-called 'benefit associations', scientific associations, &c., lack a legal organization and are merely held together by the common bond of their social or professional interests. The common interests of the community of states are expressed in the common international law binding upon its members,[3] which grew up between the civilized nations of Christendom when, after

[1] In his exposition of international law in *Die Kultur der Gegenwart*, 1906 *passim*, von Martitz speaks of an international union or a union created by international law. Without intending to assert the existence of a legal organization of states, he rather says expressly (p. 431): 'The international community is a situation of simple co-ordination. The inclusion of the individual state in the general union of states subjects it indeed to a collective will expressing itself in international law. Its conduct is subject to a necessity which is felt as a legal compulsion, and only within the limits thus imposed does the sovereignty of the state find room to act freely. But this compulsion is not that of an organization subjecting states to a central supra-national authority. The beginnings of such an organization in the form of smaller unions for the pursuit of special objects are, indeed, not lacking. But they are merely contractual in character. A political constitution of mankind in the form of a united state such as the Middle Ages demanded, or in the form of a federated state which is the political ideal of modern times, would be an entirely new international system; it would set up state law in place of international law.

[2] Jellinek, *Allg. Staatslehre*, p. 86.

[3] See Huber's important treatise, *Contributions to the Science of the Sociological Foundations of the Community of States*, in the *Jahrbuch des öffentlichen Rechts*, vol. iv, p. 56 et seq., *passim*.

the breaking up of the system of the Middle Ages, the individual states which had become completely independent gradually became conscious of the community of interests existing between them, and then developed into a world law.[1] Nevertheless this law has not without reason been called ' anarchistic ',[2] because it grew up under social conditions which lacked a legal organization. The occasional international congresses at which there was a co-operation of the community of states, the first one on a large scale being the Westphalian Peace Congress of 1644–8, are rightly described by Huber as mere symptoms of the existence of a community subject to international law ;[3] they do not imply an organization of this community, because they only met *ad hoc*. And although the Holy Alliance and the Quadruple Alliance of November 20, 1815, later enlarged to a Quintuple Alliance by the treaty of Aix-la-Chapelle of 1818, proposed a somewhat different project, yet these projects of successive conferences were merely of a temporary character. Von Liszt deserves the credit of having been the first to make the nature of the international union of states the object of a special study ;[4] but in my opinion he is mistaken when he says that ' it can be stated in general that the community of states subject to international law is based upon, and can only

[1] Concerning the gradual extension of the sphere of international law, see my address at the First Universal Races Congress in London, 1911, published in the *Mémoires sur le contact des races*, edited by Spiller, London, 1911, p. 424 et seq. ; compare also Nippold in vol. ii of Kohler's *Zeitschrift für Völkerrecht und Bundesstaatsrecht*, p. 441 et seq.

[2] See Jellinek, op. cit., p. 341.

[3] Huber, op. cit., p. 98.

[4] Von Liszt, *Das Wesen des völkerrechtlichen Staatenverbandes und der internationale Prisenhof*, Memorial volume of the Legal Faculty of Berlin to Gierke, 1910.

be based upon, an organization of a non-legal character'.[1] The prevailing theory has thus far rejected, and must reject, every form of legal organization of the community of states. For we cannot conceive of a community as legally organized if it possesses no organs.[2] If the union is still so loose, and if the special groups which assume a sort of leadership over the others lack separate organs, the concept of a legal organization would at least require that there should exist a permanent and systematic co-operation of the body of members according to definite rules of law. But when and where have the members of the international community up to the time of the First Hague Conference met together for anything else than temporary co-operation ? Von Liszt appeals to a saying of Stammler that in the idea of co-operation there is involved the idea of a regulation of that co-operation ; but such co-operation took place only very infrequently. We must not conclude from the fact that states are members of a supra-national legal system that they are also organized into a juristic association. There can be associations between individuals which are governed by law in the form of social conventions ; [3] whereas a juristic association implies an organized body which works as a unit. Such a union of states did not exist, and accordingly Jellinek

[1] Op. cit., p. 5.

[2] R. Schmidt, *Allgemeine Staatslehre*, vol. i, p. 9, speaks to the same effect : 'Unions exhibit themselves as forms of external organization, as groups of persons which possess at least one organ acting for them.'

[3] Concerning the manner in which international law arose as a positive system within the international community, see von Ullmann, *Völkerrecht*, 2nd ed., p. 17 et seq. See also von Martitz, op. cit., p. 431. The idea of Oppenheim (op. cit., p. 14), that in admitting the anarchistic character of the community of states one must deny the existence of an international law does not seem to me correct.

was justified in coining the above-mentioned expression: 'The community of states is accordingly purely anarchistic in character.' The necessary practical guarantees for the continuity and fixity of the international community and for a development of international law as systematic as possible was secured by the merely occasional international congresses which met in the nineteenth century at Vienna, London, Paris, and Berlin; but they did not in any way mark the beginnings of a legal organization.

CHAPTER II

THE WORLD FEDERATION CREATED AT THE FIRST HAGUE CONFERENCE

Section 1. The Idea of International Organization and the International Administrative Unions

Before we examine the influence which the Hague Conferences have had upon the international community we must consider the chief tendencies which gave birth to the work at The Hague. If we look back first of all upon the history of international law we find a large group of ideas which were binding in the relations of states to one another. The principle of the balance of power in Europe, the idea of legal succession, the principle of nationalities, were the political doctrines which in earlier times men endeavoured to realize in the intercourse of states, and which, since there is generally an overlapping in the successive stages of the history of civilization (for instance, the survival of ideals of the Middle Ages in present-day orthodoxy), even to-day play a definite rôle in the relations of states to one another. It is generally said that those ideas were more or less abandoned when the 'solidarity of interests' came to be recognized.[1] Quite right, but this recognition is only the basis for a new political idea, namely, the idea that a corresponding international organization must be found for this community of interests which is unquestionably at hand. If Robert von Mohl has already endeavoured to amplify and to confirm the principle first

[1] See, among others, Rivier, *Lehrbuch des Völkerrechts*, 1889, p. 30.

laid down by Kaltenborn in 1847,[1] by setting forth national problems upon an international basis,[2] we see these problems in our day realized to a great extent in an international administration which daily grows in importance. The idea of the solidarity of interests was, indeed, obliged to create the demand for corresponding institutions for the realization of that idea. But in so doing a new legal programme of international law was drawn up, the demand for international organization. This demand alone can be set up as equivalent in importance to the ideas of the balance of power, of legal succession and of nationality in their historical bearing upon the relations between state and state. For those ideas also were in the international life of states not theoretical principles, but political postulates.[3] Modern international law is accordingly dominated by the idea of international organization. To the same effect Huber justly remarks:

> The greater the interest of states in the regulation of an affair by agreement, the more must the need make itself felt not merely of establishing unity by creating appropriate legal institutions and a corresponding legal obligation upon the states, but of strengthening this unity

[1] *Kritik des Völkerrechts*, p. 289, where it is said: 'We consider the international society as more important than the state which is a member of it. Accordingly international affairs are the objects of public law in the same natural, unrestricted, and independent way in which the municipal affairs of the state are the object of law in spite of the freedom of the individual.'

[2] R. von Mohl, *Staatsrecht, Völkerrecht, Politik*, vol. i, 1860, p. 579 et seq.

[3] For that reason Nippold (*Die Fortbildung des Verfahrens in völkerrechtlichen Streitigkeiten*, 1907, p. 56, note 31), in agreement with Bulmerincq, wishes to exclude them entirely from international law as being unsuited to a legal system. But Nippold overlooks the fact that the principle of solidarity advocated by him is just as little a dogmatic legal principle.

and agreement by means of a separate and independent organization and of blending to this end the concurrent wills of the states into a new collective will.[1]

If we consider that, according to Sombart's well-known statement, the industrial changes from the year 1300 to 1800 were not so great as those from 1800 to 1900, we can understand how this need of an international organization manifests itself, to an extent not suspected before, in the new age of international commerce. This need has first of all, within the larger circle of the international community, which in our time has changed from a European to a world-wide one, given rise to smaller associations of states for particular ends. In those cases in which the need of international regulation has been particularly urgent the necessary international organization has been

[1] Huber, op. cit., p. 72. If, on the other hand, Pohl, in his work upon German Prize Law, 1911, p. 209, speaks disparagingly of a 'seeking after an international organization at any price, the plans for which at the Second Hague Conference apparently implied a rejection of the Hague Arbitration Court of 1899', that only shows that Pohl, like the majority of German nationalists, is considerably behind the international spirit of the times—which, in my opinion, is exceedingly unfortunate for a writer of international law and which cannot be compensated for by any amount of industry in the treatment of the law. The co-operation of German science in the Hague problems can only be helpful if it is given in the spirit of the Hague Conferences. This 'spirit of the Conferences', as expressed by one of its members, the Austro-Hungarian delegate, Mérey von Kapos-Mére, was the endeavour and the desire of all the members to substitute as far as possible in certain matters in place of the will of one state, in place of the decision of one government or its organ, an international will, an international decision: see the proceedings of the second subcommission of the First Conference, *Actes et documents*, vol. ii, p. 807. Pohl (op. cit., p. 195) considers the idea eccentric. As a matter of fact Mérey, as an official member of the Conference, formulates here in an excellent way the idea which at present determines the development of international law, and will do so more and more as time goes on.

created.[1] According to the prevailing theory associations of this kind are to be distinguished from a confederation only by the fact that they do not affect the whole life of the contracting states, but merely seek to regulate certain administrative affairs which are to the common interest of all.[2] On the other hand, the international administrative union shares with the confederation the characteristic which distinguishes the confederation from the simple alliance, namely, the presence of independent organs which embody the will of the union. Accompanying these unions we find the international conference, the international bureau, the 'directing state', the international commission and the arbitration court, although each union does not possess all of these organs. Accordingly, we have here organized state unions which fall short of being complete state unions only for the reason that they have not been entered into by the contracting states for a political object and, accordingly, do not affect the whole life of those states. Rehm speaks thus:[3]

> While the so-called administrative unions are international associations they are in their legal nature in no way different from co-operative confederations. The confederation is also an international association of states with common organs for the accomplishment of

[1] In this connexion I refer merely to the last work upon the subject, namely, the excellent book by Reinsch, *Public International Unions*, Boston and London, 1911.

[2] Jellinek, *Allg. Staatslehre*, 1889, p. 678. Also his *Die Lehre von den Staatenverbindungen*, 1882, p. 172.

[3] Rehm, *Allg. Staatslehre*, 1899, p. 97 et seq. The fact that Rehm, unlike Jellinek, makes a distinction between co-operative and corporate confederations need not be considered here, for Rehm makes the same distinction with regard to administrative unions. The question for the moment is merely the line between confederation and administrative unions.

its purposes. If, nevertheless, they are not called confederations, if we do not speak of postal, customs, or telegraph and railway confederations, but merely employ the expression 'international unions', organized administrative alliances and, at most, administrative federations, this is a distinction of secondary importance for the legal nature of the institution. We use the term 'confederation' only when a state is affected by the federal relationship in its entire personality, in its whole existence, and this is the case when the confederation relates to the so-called political aims of the state in the strict sense, to the question of state existence, of the preservation of the state, or, as treaties read, to the integrity and inviolability of the state; in other words, when it affects the most important aims of the state, the existence of the state as a Power, national policy, policy in the strict sense . . .

Before we examine whether the work of The Hague is to be placed on the same level with the above-mentioned international administrative unions or whether something more has been created, we shall proceed to consider how the work of The Hague has thus far been appraised, in particular by German jurists.

Section 2. The Various Estimates of the Work of the Hague Conferences [1]

I am persuaded that, on the whole, the work of The Hague has thus far not been correctly estimated in Germany either in its political or in its legal significance. German international law scholars were at first even of the belief

[1] Otfried Nippold (op. cit., p. 94 et seq.) has collected with great care the opinions expressed upon the First Hague Conference by jurists, both within and without Germany, down to the year 1907. In the meantime, however, entirely new points of view have been brought forward, and for that reason the writer undertakes to present again the various estimates passed upon the work of The Hague.

that the significance of the Hague Conference lay in the codification which it made of the more important and more difficult subjects of international law, and they were in part quite indifferent as to the erection of the Permanent Court of Arbitration. The German delegate, Zorn, wrote shortly after the Conference that the term 'Peace Conference' which was in general use at The Hague during the sessions, and which received a certain official character by its place in the Final Act, was in reality an inappropriate one. 'By far the greater part of the work was given over to war, and it is in that field that the important and incontestable results of the Conference are to be found.'[1] And even ten years later the other technical delegate from Germany, Professor von Stengel, in his book *Weltstaat und Friedensproblem*, 1909,[2] asserted that 'really important and practical results were reached by the Conference merely in the two conventions adopted by it, the Convention for the adaptation of the principles of the Geneva Convention to maritime war and the Convention concerning the laws and customs of war on land'. To be sure he adds that in order to reach these results it was not necessary to set on foot an international peace conference with sessions running for eleven weeks; rather these agreements could have been obtained in a simpler and less troublesome way. The establishment of the so-called Permanent Court of Arbitration and the detailed regulation of arbitral procedure did indeed create, he said, a certain facility for the application of arbitral procedure, but no special significance could be attached to these institutions;

[1] See Zorn on the results of the First Hague Conference in the field of international law, in the *Deutsche Rundschau* of 1900, p. 122.

[2] Von Stengel, op. cit., pp. 44, 49. The same author speaks similarly in the *Archiv für öffentliches Recht*, vol. xv, pt. 2.

for the friendly settlement of an international dispute was before that time in no way prevented by the lack of a codified law of arbitral procedure, just as it is still possible to find and obtain suitable arbitrators even apart from the Permanent Court. Stoerk went so far as to think that the characteristic feature of the Conference was after all what it did not accomplish; the reception which it met with was not encouraging enough to justify repeating the effort, and this fact he thought made the Hague Conference hurtful to international law.[1] Triepel also says that in the matters which had nothing to do with peace, that is, in the codification of the law of war, the Conference did indeed more than was expected of it, but he admits that in other respects it was a failure.[2] Von Bar passes a similar pessimistic judgment.[3]

Before taking up the divergent opinions of other authors we must state that the above-mentioned German scholars are strangely at variance with the spirit of the First Hague Conference. At The Hague itself no one thought of looking upon the codification of the law of war as the essential part of the work done, or of admitting that the Conference was on the whole a failure. In his valuable concluding address no less a person than President Staal gave his estimate of the results of the First Hague Conference in the following words:

> But the work which, as it were, opened up a new era for the authority of international law is the Convention

[1] Stoerk, in the *Revue générale de droit international public*, vol. 6, p. 846 et seq.

[2] Triepel, in his inaugural address at Tübingen, *Internationale Schiedsgerichte und die Haager Konferenz von 1899*.

[3] *Der Burenkrieg, die Russifizierung Finnlands und die Haager Konferenz*, 1900.

for the pacific settlement of international disputes. Its import is well expressed in the introductory clause, 'for the maintenance of the general peace'.[1]

Accordingly, international law scholars outside of Germany adopted from the start an entirely different attitude towards the work of The Hague.[2] In Germany also a change of attitude gradually came about. As early as 1901 von Liszt stated that the Arbitration Convention introduced a new epoch in the history of the development of international law.[3] It is greatly to the credit of Meurer to have brought about at that time a better estimate of the results of the Hague Conference with regard to the law of peace.[4] Any one studying the proceedings of the First Hague Conference with the same thoroughness as Meurer must, in spite of his scepticism, become more or less imbued with the spirit of the Conference. Meurer gives his estimate of the Court of Arbitration as follows: This noble institution can in reality greatly contribute to strengthening in the world the sense for law. 'The Permanent Court of Arbitration is the very embodiment of the international idea of law, and through resort to it the development of international law can easily be directed along fixed lines. Assuredly the Permanent Court of Arbitration is suited "to give a certain stability to the

[1] See the concluding address in pt. 1 of the official edition of the *Proceedings*, pp. 211–13, and note also the address of Baron d'Estournelles at the final session and the valedictory address of the Dutch Minister, de Beaufort.

[2] This is stated by Nippold, who makes verbal quotations of numerous documents. Op. cit., p. 111 et seq.

[3] In one of the free university lectures at Berlin in February 1901. Cited from Fried, *Handb. der Friedensbewegung*, 2nd ed., p. 231.

[4] Meurer, 1905, *Das Friedensrecht der Haager Konferenz*; in particular, p. 288 et seq.

legal regulation of international life".'[1] In the same year, 1905, in which Meurer's book appeared, Laband gave an appreciation of the significance of the Arbitration Convention.[2] Finally, in the year 1907, as was said above, appeared the brilliant work by Otfried Nippold on the Development of Procedure in International Disputes, which has undoubtedly contributed a great deal to a correct estimate of the work of The Hague. In this connexion we should also mention the excellent work of Wehberg, who in eloquent language and with indefatigable effort seeks to enlighten jurists and laymen upon the results of the Hague Conferences for the law of peace.[3] Kohler also has become a noted champion of the modern international law of peace.[4] Particularly characteristic of the changed attitude of German science in its estimate of the results of the Hague Conferences for the law of peace is the attitude of Zorn. We have quoted above Zorn's opinion in the year 1900 that the essential results of The Hague were to be found in the codification of the law of war. In 1903, however, he expressed himself very cautiously as follows:[5]

[1] In the latter words Meurer follows the view expressed in the famous memorial of Descamps to the Powers concerning the organization of an international court of arbitration.

[2] See the article by Laband on 'International Arbitration Courts' in the *Blätter für vergleichende Rechtswissenschaft und Volkswirtschaftslehre*, April 1905.

[3] See in particular the excellent introduction in Wehberg's edition of the text of the Hague Conferences in 1910; his *Kommentar zum Schiedsgerichtsabkommen*, Tübingen, 1911; the work mentioned on p. 6, note 3; finally his treatise, *Internationale Schiedsgerichtsbarkeit*, Berlin, 1911; and numerous contributions to the press.

[4] See Kohler's treatise, *Die Friedensbewegung und das Völkerrecht*, mentioned on p. 4, note 3.

[5] In no. 309 of the *Tag*.

> At all events the Hague Court of Arbitration is in operation ;[1] no one can say whether it will develop for good or for ill, whether a strong tree will grow from these slender shoots or whether they will die off and the Court of Arbitration come to an end. It is my hope that the former will be the case . . .

And in another place :

> The future must teach us whether the Hague Court of Arbitration possesses the strength and power of development to become the valuable element in the life of states which all those who co-operated in the Convention earnestly sought to make it. . . .[2]

At the present day Zorn has actually become an advocate of the movement in favour of the arbitration court. In his last publication, *Das Deutsche Reich und die internationale Schiedsgerichtsbarkeit*, Zorn speaks as follows :

> On the other hand, another idea which exercised a strong influence upon both Conferences, and which was ridiculed in Germany as an illusion, has completely cast off its visionary character and has won a strong position in the sober realities of international affairs—the idea of international arbitration.[3]

As a matter of fact neither scepticism nor pessimism has

[1] At that time the Court was already hearing its fourth case, namely, the dispute between Great Britain and France concerning the protectorate over the sultanate of Muscat.

[2] Ibid., no. 323.

[3] See the above-mentioned pamphlet of 1911, p. 9. A different estimate of arbitration can be found in other publications by Zorn in recent years; see, for example, his treatise upon the Second Hague Peace Conference in the November issue of the *Marine-Rundschau* for 1907 ; his article upon the work in international law of both Hague Conferences, in the *Ztschr. für Politik*, vol. ii, 1909, pt. 3, and his memorial volume to Carl Güterbock, *Zur neusten Entwicklung des Völkerrechts* of 1910.

been able to check the triumphal progress of the Permanent Court of Arbitration, and Wehberg rightly says : [1]

> It may without exaggeration be said at the present day that the Hague Court has gradually won a very significant position in the minds of the nations. Not only has the number of cases referred to it become very considerable, for in contrast with the five cases which were decided by it from 1900 to 1907, seven cases have been referred to it in the last three years ; but in addition the importance of the individual cases has become increasingly great, in proof of which I refer merely to a dispute such as the Casablanca case, which nearly brought on war between Germany and France, and to the Newfoundland dispute, which involved very difficult legal problems.

Accordingly we can distinguish two successive periods with respect to the estimate made of the work of The Hague by German legal science. The first regarded the codification of the law of war as the essential thing, and, as was said above, looked very doubtfully upon the Court of Arbitration ; the second shows that the great significance of the Hague Court in relation to its functions has been fully taken into account ; but it has fallen to me to introduce a third period which will rightly estimate the work done at The Hague in the way of international organization. On this point it seems to me that no one has thus far studied things with the proper thoroughness. He who does so must, in my opinion, come to the conclusion that for the science of law and for politics the Hague Conferences mean nothing more nor less than that they have brought about for us a world federation. International law, in manifesting its enthusiasm for the Court of Arbitration as such, has thus far more or less overlooked the

[1] Introduction to his commentary upon the Convention for the pacific settlement of international disputes, 1911.

significance of the Hague Conferences in their effect upon international organization, has committed in a striking way an error which the peace movement had committed before it—an error which would have been avoided if German international law scholars had not until of late been too cautious to come into personal and actual contact with the pacifists. On the road from illusion to science which the modern peace movement has travelled since 1815, we can clearly distinguish, as its first German champion, Fried, has cleverly shown, three stages of development. After an ethical-religious period which combated war, there followed a second period which welcomed arbitration as a substitute for war. But since that time the youngest generation of the pacifists has long perceived that it was not enough to create a court of justice for disputes between states, but that we must remove the causes of these disputes, which lie in international anarchy, that in order to do away with war we must set up an international legal system, we must organize the world.[1] It is, as was said, very interesting to see how international

[1] Fried gives us that clever sketch of the development of the peace movement in an article in the *Kölnische Zeitung* of August 13, 1906, No. 862, and Meurer reproduces it in the second volume of his work upon the Hague Peace Conference, p. 636. See also the 2nd ed. of Fried's *Handbuch der Friedensbewegung*, 1911, *passim*. Ibid., p. 8 : ' According to the modern peace movement war is a symptom, the result of an underlying cause. It comes from the fact that the relations of states are not yet completely regulated, not yet entirely organized, from the anarchy which still prevails between states. To be sure this anarchy is on the point of disappearing, and the states are already organizing themselves. But this organization is still in the making, and the forces of order are still fighting with the forces of disorder. To arouse mankind to co-operate in the work of making order completely prevail is the task of the peace movement. It directs its efforts against the causes of war and is indifferent to combating the symptoms. The increasing armaments, the great armies and navies, war itself, are symptoms against which it seems

law is now in every case hobbling on behind these ideas of the pacifists. The ethicohumanitarian period of the peace movement has not been, as the public might perhaps think, without its influence upon international law. The Geneva Convention of 1864, the St. Petersburg Convention of 1868, regulating the use of explosives in war, the codification of the laws of war on land at the First Hague Conference of 1899, and the extension of the Geneva Convention to maritime war at the same Conference are all debts which international law owes to the pacifists as a result of their ethicohumanitarian fight against war.[1] It was believed that war could not be abolished, and so it was sought to alleviate the suffering attendant upon it. The pacifists are, indeed, unwilling to recognize this as a gain, and they take their stand upon the more or less just ground, in my opinion a theoretical one, that the humanizing of war is a contradiction in terms;[2] and as the pacifists have in the meantime for seventy years sought to substitute arbitration for war, so in this instance also the science of international law and diplomacy followed the

useless to fight directly. By removing the causes, that is, by removing completely the anarchy in the relations of states, those symptoms will gradually disappear.'

[1] In this connexion may also be counted a number of conventions of the Second Hague Conference, of which I may mention only one as typical of the others, the Convention relative to the laying of submarine contact mines. Concerning this Convention, see the work of my pupil, Erich Rocholl, *Die Frage der Minen im Seekrieg*, Marburg, 1910.

[2] We may concede the theoretical justness of this point of view and yet be glad of what has been accomplished, e.g., the restrictions in the use of mines in maritime war. For so long as the final aims of pacifism are not attained, every restriction of that kind upon the belligerents is to be gladly welcomed. Accordingly, in rejecting these gains, the pacifists have, in my opinion, not adopted the right attitude. The only point is that the further aims of the peace movement should not on that account be forgotten.

pacifists up to a certain point, and the First Hague Conference created optional universal arbitration. It is the problem of perfecting this international procedure which is for the moment the prime interest of diplomacy and of the science of international law. There is involved in it, as the Second Hague Conference has shown, the question of obligatory arbitration,[1] the question of a truly permanent court of justice,[2] there is involved the demand raised since that time by industrial institutions that the court of justice shall have jurisdiction for private claims against foreign states,[3] there is involved the establishment of a court of justice for important and difficult questions of international private law.[4] Even in so progressive a book as that by Nippold we find the development of international procedure described as 'the greatest task of international law of the present day', a task which Nippold thinks is only equalled in importance by the development of the present administrative unions and the establishment of new administrative unions.[5] In contrast to this view, as was said above, is

[1] For further suggestions see the above-mentioned treatise by Zorn, *Das Deutsche Reich und die internationale Schiedsgerichtsbarkeit*, 1911.

[2] It is well known that the Second Conference evolved a project for a truly permanent court of justice, which was to sit side by side with the Court of Arbitration of 1899, and that the adoption of this project was defeated only by the provisions concerning the number of judges which each Power was to appoint to the court. The Conference was accordingly obliged to limit itself to a recommendation to the Powers for the adoption of the draft as soon as an agreement could be reached upon the selection of judges and the composition of the court. See below for a further discussion.

[3] For explanation, see the treatise by Wehberg, *Ein internationaler Gerichtshof für Privatklagen*, Berlin, 1911.

[4] This demand is made by Zorn on page 45 of the treatise mentioned on p. 27, note 3.

[5] Nippold, *Die Fortbildung*, &c., 1907, p. 62 et seq. Compare in this connexion the description which Nippold, at the conclusion of his new

the recognition of the pacifists that in truth arbitration, as its opponents say, is incomplete and can never settle the great questions which have thus far led to war, and that just as the great task of medicine is now seen to consist in the prevention of disease, so the creation of a permanent international organization must forestall the possibility of conflicts.[1]

It is only in Wehberg that we find of late the entirely correct view :

> The goal of international progress is the ever greater organization of the world, which alone can be a check upon war. Considered in this connexion, even obligatory arbitration is only an imperfect work, in so far as it alone can never diminish disputes to any extent and settle them satisfactorily. It is never more than a manifestation of an actual inner coherence of the international life of nations. For obligatory arbitration fails especially in those cases where the confidence of nations, and the international law which is the result of it, is not great enough.[2]

The necessity of an international organization of peace is shown less by the valid objections against arbitration as a panacea for war, than by the striking failure which the idea of disarmament met with at both Conferences, although that was precisely the motive originally set forth

valuable book on the work of the Second Hague Conference, pt. 2: *Das Kriegsrecht*, 1911, gives of the work to be done by the Third Hague Conference, p. 283 et seq. Here also the author is entirely silent upon the development of the family of nations into an organized whole, although he speaks of the periodicity of the Conferences as having been ' so fitly ' secured. Likewise the critical review of the first part of that treatise is concerned only with the problem of obligatory arbitration.

[1] See the above-mentioned article by Fried, printed in Meurer's book. In the same connexion, Fried's learned work, *Die Grundlagen des revolutionären Pazifismus*, Tübingen, 1908.

[2] In his edition of the Conventions of the Hague Conferences, 1910, p. 31.

in the celebrated circular letter of August 24, 1898, in which the Czar invited the Powers to the First Hague Conference.[1] Meurer's opinion that 'the cessation of armaments and disarmament are indeed deceptive aims so long as a comprehensive international peace organization does not make war impossible',[2] seems to me, indeed, to have much truth in it. At any rate international organization must have so far advanced that the mutual distrust of senseless wars of conquest shall have disappeared, which, unfortunately, it cannot be said to have done at the present time. But when Meurer continues: 'At the present time we have hardly made a beginning towards such a peace organization,' I cannot agree with him on that point. It is merely a question, in my opinion, of throwing light upon the organizing value of the work at The Hague, and then we shall see clearly the road which we must travel in order that, through the perfecting of this institution, we may attain our high purpose. This brings me back to my effort to place the Arbitration Convention in a new light in *this* respect. This has already been attempted by other persons. In connexion with an opinion, cited above, upon the results of the First Hague Conference, von Liszt says:

> But even more important [than the international regulation of procedure and the permanent court of justice] is the circumstance that we have here in reality a new organ for the development of a central power, the first steps towards which have already been taken—an organ which in its whole composition stands far above all these other organs which we possess up to the present. The International Court of Arbitration at The Hague gives expression in a palpable way to the community of states under the rule of international law, and

[1] See Meurer, vol. i, p. 9.

[2] Ibid., vol. ii, p. 633.

> we can no longer regard all those efforts which aim at abolishing war as purely Utopian schemes. If we examine the Permanent International Bureau at The Hague, we shall see that behind this Bureau stands the entire judicial court, and we shall recognize in a very palpable way the embodiment of a legal union between states.[1]

In like manner Laband, as early as 1906, said that the Court of Arbitration appeared to have opened the way to the development of a legal and pacific organization comprising all the European states.[2] However, those are more or less colourless expressions, which on the one hand indeed insist upon the organizing value of the Arbitration Court, but on the other hand fail to classify in a juristic way the organization comprised in that development and to define the present legal situation in this respect. I myself have been bolder and have already taken an advanced stand. My treatise, *Die Organisation der Welt*,[3] mentioned in the introduction, which appeared first in 1908, endeavoured to prove that the Hague Conferences not only introduced, as von Liszt thought, a new period in the history of the development of international law, but also a new period in the history of the world. We are still in the habit of regarding the history of the world primarily as political history, and perhaps this will always be the case. After the period of antiquity, which ended with the world-embracing Roman Empire, the Middle Ages followed in which Emperor and Pope endeavoured to carry on the ancient idea of world domination; the breaking up of the system of the Middle Ages introduced that period, many centuries in length, which we call by the meaningless

[1] See p. 25, note 3.

[2] See Laband's article upon the 'Progress of Law from 1896 to 1905' in the *Deutsche Juristenzeitung* of January 1, 1906.

[3] Special ed., Leipzig, 1909.

and inappropriate term 'modern times', although it is now half a thousand years old. This so-called modern age I have described as a period of disorganization, and have shown that with the coming of the Hague Conferences it was succeeded by a new era in which the civilized world began to organize itself politically.[1] But as a jurist I also endeavoured to describe more in detail the nature of the organization of the civilized world which was in the act of growth, and I arrived at the conclusion that the development led up to a world federation.[2] Perhaps my work was not altogether without stimulating influence upon the science of international law. First of all, in the year 1910, there appeared the very valuable study by Max Huber, *Beiträge zur Kenntnis der soziologischen Grundlagen des Völkerrechts und der Staatengesellschaft* [Contributions to the Science of the Sociological Foundations of International Law and of the Community of States],[3] which, although in my opinion too sceptically, investigated among other things the beginnings of an international organization of

[1] The discovery of the new world is generally regarded as one of the factors determining the dividing line between the Middle Ages and the so-called modern times. In like manner the latest period of the history of the world is characterized by the fact that the Far East has now entered into the circle of the family of nations. The idea that the First Hague Peace Conference introduced a new era in the history of the world is not at all disposed of by the fact that the contemporaries of that event did not regard it as having such an effect. It is a well-known fact of experience that in the great majority of cases it is quite impossible for the contemporaries of a given event to estimate properly its significance for the history of the world ; and that it is only after long years that the epochal significance of events is understood. With what little concern did the Roman Senate probably receive from Pontius Pilate the report of the execution of Jesus Christ, upon which it is believed that Tacitus later based his account in the *Annals*.

[2] Schücking, *Die Organisation der Welt*, 1909, p. 80.

[3] Vol. iv of the *Jahrbuch für öffentliches Recht*, p. 56 et seq.

the community of states. In the same year von Liszt, in the sixth edition of his excellent text-book, gave to section 16, for the first time, so far as I know, the title, 'The Organization of the International Union,' instead of its previous title, 'The Organs of the International Community in General;' [1] accordingly he replaced the more sociological concept of the international community for the first time by the more legal concept of the 'international union'. To be sure he begins this paragraph with the statement that there is lacking a permanent and general organization of the international community, and that the idea of a permanent or, indeed, of a periodic legislative assembly of states has a place only in the Utopian dreams of those writers who have visions of a world state. Whether and in how far these assertions are still just we shall examine below. In the same year, 1910, as a part of the memorial volume to Gierke, there appeared a monograph by von Liszt entitled *Das Wesen des völkerrechtlichen Staatenverbandes und der internationale Prisenhof* [The nature of the International Union of States and the International Prize Court], in which von Liszt asserts that the Second Hague Conference, by the creation of the International Prize Court, fundamentally altered the nature of the international union, and actually set up a new legal authority over the states. These assertions of von Liszt will be considered at greater length below. Latest of all, in 1911, when the manuscript of this book was already for the most part finished, there appeared the important study by L. Oppenheim, *Die Zukunft des Völkerrechts* [The Future of International Law],[2] which to my great pleasure was in accord

[1] p. 135.

[2] Separate impression from the memorial volume to Karl Binding, Leipzig.

with the ideas which I myself had earlier expressed. Oppenheim also points to the beginnings of an organization of the international community, and after insisting upon the necessity of maintaining the full sovereignty and absolute equality of the states within the organization, he continues:

> I say, we have before our eyes the beginning of the development. It consists in the creation of the Permanent Court of Arbitration at The Hague and in the International Bureau connected with it. This court is not a court of the individual contracting parties, but of the society of nations in contrast to its individual members, and each member has a right to have recourse to it. If the Declaration of London is ratified and if (which can hardly be questioned) the other states which did not take part in the London Naval Conference give their adhesion to the Declaration, the International Prize Court adopted at the Second Hague Conference will become a reality. This court will likewise be an organ of the society of nations. . . . And finally, with regard to the Hague Conference itself, it must be pointed out that, as is to be expected, such Conferences will meet periodically in the future. If we succeed in bringing all the members of the society of nations into an agreement that the Conference shall meet periodically at The Hague without being called by this or that power, then we shall have at hand an organ of the society of nations the significance of which no one can underestimate. Then can it be said that the society of nations has become a truly organized society, and then can there no longer be any doubt that the organization of this society is gradually developing more and more. Above all, the object will then be attained of bringing into life an organ of the society of nations comparable to the parliaments of states, an organ which can perform at need the duties of an international legislature, can direct international administration, and can unify more and more international judicial decisions.

Oppenheim then rightly lays stress upon the necessity of drawing up a constitution to accompany the agreement of the society of nations that its Peace Conferences shall become periodical, and proposes fixed principles for this constitution. We shall return to this idea later.

In this connexion I might merely state that the organizing value of the Hague institutions, to which I have called particular attention, has likewise been occasionally emphasized by foreign writers. The well-known English international scholar, Lawrence, likewise finds the important results of the First Hague Conference not in the creation of the Court of Arbitration as such, and, needless to say, not in the codification of the law of war, but in the organization of the civilized world, the basis of which was there laid down :[1]

> Perhaps the most epoch-making performance of the First Hague Conference is one to which little attention was directed at the time. Before it separated, it expressed various wishes, among them being three, each of which desired that an important matter which it named might be considered by a subsequent Conference. It thus suggested that it should not stand alone, like a great war or a great alliance, far-reaching indeed in its consequences, but in itself unique. Instead, it desired to be reproduced with all convenient speed. The words of its Final Act spoke only of a second assembly, but the thought implied a series of assemblies.

Lawrence then speaks of the recommendation made by the Second Conference for a Third Conference, and continues :

> It is impossible to suppose that these suggestions would have been made unless their authors had contemplated a series of Hague Conferences. In fact, the society of nations is developing a new organ. Unless

[1] Lawrence, *The Principles of International Law*, 4th ed., London, 1911, p. 49.

untoward events destroy the progress already made, in less than a generation the periodical convocation of an international legislature will be as much a matter of course as the sending of diplomatic missions or the negotiation of important treaties. Already a palace at The Hague is being prepared for the assembly, owing to the liberality of Mr. Andrew Carnegie.[1]

In another work Lawrence sketches the development of the community of states in a manner similar to that followed by me in my *Organization of the World*, and in this connexion he comes to speak of the significance of the Hague Conferences : [2]

Not only will a Third Hague Conference be held after the lapse of a few years, but a series of such Conferences may be expected with reasonable confidence. The importance of such a consummation can hardly be overestimated. It provides for a development of international society which will be gradual and natural and therefore far more likely to be permanent than if it had been due to force or the masterful activity of one imperious will. In all probability we have obtained at length a legislative or quasi-legislative organ of the great society of nations. From it are developing judicial organs in the shape of Courts of Arbitration and an International Prize Court. There are even some rudiments of an executive organ in the International Bureau at The Hague.

Lawrence then alludes to the celebrated *Grand Design* of Henry IV for the organization of Europe, and to the pacifistic ideas of James Mill, William Penn, Rousseau, Kant, &c. 'They dreamed dreams. We are confronted

[1] The above words of Lawrence, a recognized authority on international law, are an interesting comment upon von Liszt's assertion, quoted above, that successive Conferences play a rôle only in the Utopian dreams of those writers who have visions of a world state.

[2] Lawrence, *International Problems and Hague Conferences*, London, 1908, p. 42 et seq.

by a reality.' Granted that peace has not yet been attained by means of the Hague Peace Conferences, granted that even the efforts for the limitation of armaments have thus far been without result, nevertheless Lawrence sees the beginnings of the pacific organization of the civilized world. He hopes for the same results from the work of The Hague as came from the British Parliament. The same summons is suited to the Hague Conferences as was issued by the English king in 1295 to the estates of the realm, *ut quod omnes tangit, ab omnibus approbetur.*

It is likewise of interest to know the estimate which the American scholar Hull[1] expressed with regard to the significance of the work of The Hague in the direction of organization, namely, that the indirect results of great events in the history of the world are often more far-reaching than the direct and measurable results. The paving of the way for a 'federation of the world' Hull regards as an indirect result of the Hague Conferences.

> The legislative, judicial, and executive organs of this federation are still rudimentary, of course, but they have come to life, thanks to the Peace Conferences, and give promise of larger growth. . . .
>
> This federation of the world is very far indeed from the ideal of a world empire, which was realized by Caesar and attempted by Napoleon. It is also very far from the particularist ideal of absolute and isolated autonomy on the part of each nation, which has been found to be, both in the Orient and the Occident, as undesirable as it is impossible. The golden mean between these two extremes which this federation of the world has begun to represent, is well expressed by Professor von Martens, of Russia, in his closing address to the Fourth Commission of the Second Conference: 'If we deserve any credit', he said, and his statement was received with unanimous applause, 'for the elabora-

[1] Hull, *The Two Hague Conferences*, Boston, 1908, p. 496 et seq.

tion of approved projects, it is by grace only of the conviction which inspires all of us without exception, that the days of an isolated life and of separation between the nations have passed away for ever, that nations must make mutual concessions to each other, and that only on this essential condition can the organization of the new international and common life become a great blessing to all. This, gentlemen, is the mistress idea of all our labours and this is the keystone of the edifice of law and justice, whose corner-stone we have recently laid. This idea will become in the future the solid guarantee of international peace, and, by leaving it as heritage to our successors, we shall guarantee the success of their efforts towards the ideal which we have pursued.'

Besides, this expression of opinion from Hull does not stand alone in the literature of the United States; no less a person than Holls, who, as delegate from the United States, was one of the leading personalities of the First Conference,[1] gave expression to a similar view in the following words:[2]

> The federation of the world—for justice and for every universal civilized interest—that is the idea which found its best, if not its first, illustration in the Peace Conference.

And likewise the technical delegate of the United States at the Second Conference, James Brown Scott, who played a leading rôle at the Conference, says in the conclusion of his excellent exposition of the work of both Conferences:[3]

> The positive results of the Conferences are therefore

[1] Concerning the influence exerted by Holls for the adoption of the Permanent Court of Arbitration, see Zorn in the *Tag*, 1903, no. 323, and B. von Suttner, *Tagebuchblätter*, p. 64.

[2] Holls, *The Peace Conference at the Hague*, New York, 1900, p. 364 et seq.

[3] James Brown Scott, *The Hague Peace Conferences of 1899 and 1907*, Baltimore, 1909, vol. i, p. 738 et seq.

> of such importance that they mark an epoch in international law and its development. But however worthy of consideration, they are relatively unimportant in comparison with the institution of the periodic Conference, which unites for a brief space the representatives of the world and legislates, although *ad referendum*, in the common interest. . . . The very existence of the Conference is a demonstration of the oneness of mankind, of the superiority of general to special interests and local policy, and the successes of the Conferences show the possibility of harmonious co-operation among nationalities differing in race, institutions, languages, and traditions.

Scott also discusses in this connexion the celebrated projects for organization proposed by Sully, Saint-Pierre, Bentham, and Kant, and he concludes his book with the pointed words: 'It seems, therefore, that the foundations are laid for an international organization. It depends on public opinion to rear the structure.'

When men who have done practical work of the highest importance at The Hague have thus expressed themselves it is doubtless time that Germans should cease to regard similar ideas held by the author as an impracticable theory of the study room, and that they should no longer ridicule as a mere Utopian scheme what has been already fully realized since 1899: the political organization of the civilized world. In studying this organization in the following pages, we shall first of all start from what has been actually accomplished in the way of judicial organization at The Hague, facts which it seems to me have not thus far been studied with sufficient thoroughness.

First of all, then, we have to examine what kind of an organization was created by the First Hague Conference.

Section 3. The Organization created by the Convention for the Pacific Settlement of International Disputes

By the convention of the First Hague Conference the signatory powers established for the maintenance of the general peace a Permanent Court of Arbitration, to which they joined an International Bureau under the control of an Administrative Council. The costs of the Bureau will be borne by the signatory powers in accordance with the apportionment adopted for the international bureau of the Universal Postal Union.[1] All of these organs perform their duties in the name of the signatory powers. The permanent Administrative Council,[2] composed of the diplomatic representatives of the signatory powers accredited to The Hague and of the Netherland Minister for Foreign Affairs as president, will be charged with the establishment and organization of the International Bureau, which will be under its direction and control; it will notify the powers of the constitution of the Court and will provide for its installation; it will settle the rules of procedure and all other necessary regulations. It will decide all questions of administration which may arise with regard to the operations of the Court; it will have entire control over the appointment, suspension, or dismissal of the officials and employees of the Bureau. It will fix the payments and salaries, and control the general expenditure. At meetings duly summoned the presence of five members is sufficient to render valid the discussions of the Council.[3]

[1] Article 29 of the Convention (now Article 50 of the draft of the Second Conference).

[2] Its duties are regulated in Article 28, or Article 49 of the new draft.

[3] The new draft requires the presence of nine members.

The Council communicates to the signatory powers without delay the regulations adopted by it, and it furnishes them with an annual report of the labours of the Court, the working of the administration, and the expenses.[1] There is no doubt that in the performance of all these duties the Administrative Council acts in the name and under the commission of the signatory powers. And the same is true of the Bureau.[2] The Bureau conducts all the current administrative business,[3] e.g., it keeps the list of the permanent members of the Court of Arbitration; likewise it serves as a registry for the Court of Arbitration and the commission of inquiry, and in so doing it acts as a channel for communications relative to the meetings of the Court; thirdly, it has the custody of the archives. Now in all these duties the International Bureau acts merely as an organ in the name of and under the commission of the signatory powers. Moreover, the position of the Court of Arbitration itself is particularly important. Here we must first of all distinguish between the Permanent Court of Arbitration taken collectively (*Cour permanente*) and the arbitral tribunal (*tribunal d'arbitrage*), which is given jurisdiction over specific disputes. The Permanent Court of Arbitration, taken collectively, with its seat at The Hague, is unquestionably an organ of the signatory powers

[1] The Council has been given by the new Convention the additional duty of including in its report a *résumé* of what is important in the documents communicated by individual powers to the Bureau concerning arbitration treaties entered into between them, the awards in virtue of them delivered by special arbitration tribunals, and the execution of the awards of the Permanent Court at The Hague; see paragraph 7 of Article 49 of the new draft.

[2] See Articles 22–24 and 26, now Articles 43–47 of the new Convention.

[3] Including the management of the library; see Wehberg's *Kommentar*, p. 69.

as a body, although its members, to the number of four at most, are appointed by the individual states who have signed the Convention.[1] Since the Court of Arbitration is to act for the signatory powers as a body, notice of any change in the personnel of the members must be immediately communicated by the Bureau to the other powers. When a definite arbitral tribunal is to be set up consideration is given to all of the members whose names are upon the list of the Permanent Court of Arbitration.[2] It is true that the Permanent Court of Arbitration, as an organ of the signatory powers, has primarily no duty except that of being at hand and ready at the special summons of the contending parties, to meet in the form of an arbitral tribunal *ad hoc*. Von Ullmann[3] says of this arbitral tribunal that from a legal point of view it is entirely equivalent to a free arbitral tribunal, that its jurisdiction depends merely upon the contending parties, by whose voluntary act, the arbitration treaty, it is called upon for the legal settlement of the case. This comparison of the Hague tribunal in actual operation with a free arbitral tribunal is in my opinion a cardinal error; it does not take account of the significance of the judicial functions of the Permanent Court of Arbitration in general, nor on this theory can important individual questions of arbitration be rightly decided. If we desire to answer the question aright by considering the legal basis of the decisions of The Hague

[1] Article 23, now Article 44. According to Article 45, paragraph 3, however, only one of the two arbitrators appointed by a state may now be a national of the state or one of the members representing it upon the list.

[2] Cf. note 1.

[3] *Völkerrecht*, vol. ii, p. 446. The question has, so it seems to me, been strikingly overlooked by jurists. Meurer in particular pays no attention to the subject.

we must distinguish two distinct points: first, in whose name does the Hague Court act, and secondly, under whose commission. In the case of national courts these two points coincide. The decision is rendered in the name of the head of the state, and the same head of the state authorizes the courts by law to hear cases when brought by the plaintiff in due form. It is otherwise with respect to the judicial functions of the Permanent Court of Arbitration. This court is and remains an organ of the signatory powers, which they have set up for the maintenance of the general peace. Whereas, in the case of voluntary international arbitration the parties decide for themselves, so to speak, by means of freely chosen organs which render their award in no higher name than that of the parties by whom they are appointed, precisely as is the case with an arbitration court within state lines, the contrary rule holds here. Half a century ago von Kaltenborn[1] wrote as follows:

> From the point of view of the science of international law the body of states subject to international law must be regarded *in abstracto* as obligated to protect the rights of each individual state, and accordingly is obligated to offer legal procedure and grant legal awards in the case of disputes and injuries. The injury of one member of the international community, the denial of justice, or indeed the violation of law on the part of one state towards another, affects the whole body of states because of the organic connexion of each individual member with the whole. But up to the present time the European-American concert has not grown into so united a body that the encroachments upon the rights of individual states are sufficiently felt as an injury to the whole body,

[1] Von Kaltenborn in the *Ztschr. für die gesamte Staatswissenschaft* of 1861, vol. xvii, in an article entitled 'The Revision of the Theory of International Procedure', p. 69 et seq., and p. 86.

so as to lead it to enforce the law against those that resist it. The above idea has not yet won an acknowledged position in practice, and accordingly we have not, up to the present, arrived at an international organization which is suited to protect and to define rights in the name of the international community—that is, of the concert of states.

When we read these striking words cited by Nippold,[1] and compare with them the legal situation since the First Hague Conference, we see what progress international law has made. The interest of the community of states in the maintenance of international law has become greater and greater, in particular the daily increasing economic intercourse of the world makes the injury which a war inflicts also upon neutral states more and more menacing. In consequence the signatory powers of the Hague Conference set up a judicial court for the maintenance of the general peace. Only, for the present, the jurisdiction of this judicial court, in conformity with previous legal conditions, was not made obligatory, and a second important concession was made to the contending parties that their cases should only be decided by judges of their own choice. The parties, therefore, in specific cases commission the judges to decide the affair and themselves appoint the Court, yet the Court renders its award in the name of the signatory powers, as an organ of the community of states, although, to be sure, it can only act when appealed to by both parties and in the form of a tribunal specially chosen by them.[2] What makes the decisions of The Hague so

[1] Nippold, *Die Fortbildung*, &c., p. 167.

[2] It is greatly to be desired that the decisions of The Hague should express outwardly the fact that they have been passed in the name of the community of states. Unfortunately that has not yet been the case. The proper place for this would naturally be the opening paragraph of the

significant is the fact that behind them stands the authority of the family of nations which has created this judicial court for itself and in whose name the awards are henceforth rendered. The award of the arbitral tribunal is an award of the Court of Arbitration itself as an organ of the community of states, and for that reason the Convention speaks merely of meetings of the Court of Arbitration, of the labours of the Court of Arbitration and of the management of its business, when in reality it refers to the functions of the arbitration tribunal.[1] Court of Arbitration and arbitration tribunal are even in a certain sense synonymous. The ' arbitration tribunal ' is the Court of Arbitration in action. It cannot, therefore, be asserted that as a matter of fact there is no permanent court at all, but merely a list of judges, or indeed merely a bureau.[2] Rather, the facts are that in the Permanent Court of Arbitration there is present that judicial court of the world, the idea of which Zorn was once so mistaken as to regard as dangerous;[3] the fact that the Court can only act upon the request of both contending parties does not take away from its legal position as an international judicial instrument of the signatory powers. *Mutatis mutandis*, i.e. to say, prescinding from the optional jurisdiction of the court

decision. For the decisions thus far rendered, see the *Recueil des actes et protocoles du tribunal d'arbitrage*, published by Langenhuysen Frères at The Hague. The important decision in the Casablanca case is to be found also in Strupp, *Urkunden zur Geschichte des Völkerrechts*, 1911, vol.ii, p. 516.

[1] Meurer is wrong in disapproving of this, vol. i, p. 231. The above expressions, which occur in Article 22, paragraph 2, Article 28, paragraphs 9 and 5, were rightly retained in Articles 43 and 49 of the new draft of the Convention.

[2] This assertion was made by Zorn in the debate over the designation of the Court of Arbitration ; see the account of the discussions at the Conference given by Meurer, vol. i, p. 229 et seq.

[3] See Zorn in the *Deutsche Rundschau*, 1900, p. 127.

and from the free choice of the judges from among the members of the court, the individual arbitration tribunal bears the same relation to the Permanent Court which a civil tribunal having jurisdiction in a given case bears to the superior court. It strikes one as very strange that at the First Hague Conference Germany protested first of all against the term ' tribunal ' for the Permanent Court of Arbitration, and, after this word was at its request replaced by the term *cour*, then protested even against the term *cour* and actually demanded that its protest should be put on record in order that it might reserve the right to employ the term which suited it in the German translation.[1] The Conference rightly decided, in keeping with the French-British-United States idiom, upon the term *cour* in the sense of a judicial court. Later on the German Emperor accepted that term.[2] Perhaps it was perceived that the Permanent Court of Arbitration at The Hague possessed just as much unity and authority as the supreme court of the State of New York, a fact which was originally contested by Zorn in the discussions at the Conference. More-

[1] See *Proceedings*, pt. iv, p. 191.

[2] Meurer, op. cit., p. 231. Meurer says that the form of organization of the Court of Arbitration was due in large part to Germany, which on the question of organization laid down among other things the condition that the Court of Arbitration should remain essentially only a permanent list of judges, for which each state was to appoint four suitable persons. On the other hand, Nippold (*Die Fortbildung*, &c., p. 311, note 11) asserts that nothing else was intended by the other powers from the start. Prescinding from this, we must state that the Permanent Court of Arbitration, now that it has come into existence, is something more than a list of judges. Meurer himself seems to have a dim perception of this when he qualifies his description of the Court of Arbitration as a list of judges by the word ' essentially '. Likewise Nippold appears to see something more in the Permanent Court of Arbitration than a list of judges when he discusses the possibility of having plenary sessions later on for certain cases, op. cit., p. 327 et seq.

over, the existence of a judicial court with merely optional jurisdiction, in the sense that the court only enters upon its functions when both parties call upon it, is a phenomenon which we meet with within the individual state; we need only recall the functions of the trade councils as arbitral boards for strikes and boycotts. In this instance the legislature no more attempted to make obligatory this municipal institution for the arbitration of serious industrial disputes of the present day than the signatory powers of the Hague Conference made obligatory their international court for the settlement of disputes between states. As the trade council is only called upon to render an award as an 'arbitral board' when it is appealed to by both parties, the arbitral board is only to that extent an arbitral tribunal; moreover, the composition of the arbitral tribunal is at least not entirely withdrawn from the will of the parties, for the court, in order to render a decision as an arbitral board, is augmented by persons appointed by, and enjoying the confidence of, the contending parties.[1] In spite of

[1] The legislation of a modern state for the prevention of strikes offers a very interesting parallel to the legislation of the Hague Conference for the prevention of war. The Hague Convention of 1899, in substituting the Permanent Court of Arbitration in place of the arbitral tribunals which were previously established for individual cases from time to time, can be compared to the famous British Arbitration Act of August 6, 1872, which established the arbitral boards as permanent institutions. This legislation furnished a model for other states. In determining the powers of these boards the states proceeded differently. In the first stage of development the state was satisfied with placing an organ of mediation at the disposal of the parties, leaving it to them to make use of it or not. A second stage exhibits compulsory negotiation, i.e., the parties are obliged at least to seek an agreement, and, in case they cannot reach one, arbitral procedure is required. When an arbitral award has been fully declared by law as binding upon the parties, the last stage has been reached. As conditions now stand with us there is lacking, as in England, any compulsion either to resort to the arbitral board or to carry out its

the fact that the jurisdiction of the arbitral board depends upon the will of the parties, no one has thus far doubted that the arbitral board acts as an organ of the state and renders its award in the name of the state, although under commission of the parties, and this is precisely the source of the practical value of the arbitral award, of its moral authority, which is so great that it was believed that there was no need of making the execution of the arbitral award obligatory, in the hope that the pressure of public opinion would be so great that only in exceptional cases, ever fewer in number, will the losing party refuse to carry out the award.

In international law, therefore, the award rendered by the Permanent Court of Arbitration, with the obligation of the parties to submit in good faith to it, has a wider bearing than the award rendered by an arbitral board. But in another respect a parallel can be drawn between the jurisdiction of the trade council for the decision of disputes over wages and the jurisdiction of the Permanent Court of Arbitration. The state is in a special way concerned in having such disputes over wages settled in a peaceful way as quickly as possible, and in having the trade council act as an organ appointed by it for that purpose. Accordingly it commissions the president, on behalf of the state, to endeavour to make the parties appeal

awards. The arbitral board only has jurisdiction when both parties appeal to it; yet the president, at the appeal of one party, must give notice to the other party and endeavour to persuade it to make an appeal on its part as well. He can summon the other party and examine it, and in case of non-appearance can impose a fine of not more than one hundred marks. To that extent, therefore, negotiations are compulsory. See the treatise upon legislation for the prevention of strikes, by E. H. Meyer, in the journal *Technik und Wirtschaft*, 1911, pt. ii; also § 62 et seq. of the law of July 29, 1890, in the ed. of June 30, 1901.

to the trade council as an arbitral board.[1] This is precisely the relation between the community of states and the Permanent Court of Arbitration. For this reason Article 27 of the Convention of 1899 reads as follows : [2]

> The signatory powers consider it their duty, if a serious dispute threatens to break out between two or more of them, to remind these latter that the Permanent Court is open to them.
>
> Consequently, they declare that the fact of reminding the conflicting parties of the provisions of the present Convention, and the advice given to them, in the highest interests of peace, to have recourse to the Permanent Court, can only be regarded as in the nature of good offices.

It is evident from this that the powers regard the Permanent Court of Arbitration as their organ, and are concerned in having it act when a proper case arises. We see, therefore, that in national as well as in international life, there are intermediate stages between ' free arbitration

[1] See § 65 of the law mentioned in the preceding note.

[2] Now Article 48. The obligation thus imposed upon neutrals is unfortunately only a moral one. On this point, and on the proposed changes in this respect, see Wehberg's *Kommentar*, p. 86. At the First Hague Conference it was, moreover, sought to entrust the duty referred to in Article 27, now 48, to a general secretary, but this proposal failed owing to the opposition of Germany ; see Meurer, op. cit., p. 232. Meurer thinks that the attitude of Germany towards the Hague Court was justified. It was, he says, the duty of Germany to make it clear that the Court of Arbitration was not a great monster which might oppress the political life of the states. On the contrary, it may be said that the Court of Arbitration, as it now exists, and as Meurer says Germany preferred to have it, exercises a certain moral pressure upon the contending parties to have recourse to it, and that in consequence the principle of purely optional jurisdiction and of the free choice of judges will not be maintained permanently. That is evident from the proceedings of the Second Hague Conference, although they have thus far remained without result.

tribunals', whose authority is conferred merely by the act of the parties, and those judicial courts of an organized community which, in accordance with the will of the community, possess obligatory jurisdiction. And this intermediate stage is reached when the community creates for itself a judicial court, which is to act as its organ, but which in individual cases must receive its commission to act from the two contending parties. For this reason, when persons assert with von Ullmann that the tribunal set up under the rules of the Permanent Court of Arbitration is from a legal point of view equivalent to a free arbitration tribunal, they fail to appreciate the great achievements of international law in recent times. Von Ullmann's idea is, moreover, not at all, as the author seems to assume, a consequence of the sovereignty of the individual states which have established this Court for themselves by treaty. For so long as the jurisdiction of the Permanent Court of Arbitration, even prescinding from the fact that in the specific case it always depends upon the will of the parties, is based upon a Convention which may be denounced, the sovereignty of the states remains secure.

The fact that the members of the arbitral tribunal which is constituted out of the Permanent Court of Arbitration for a specific case have a different legal position from that of the members of a free arbitral tribunal is recognized in the Hague Convention itself, in that it conceded to them in the exercise of their office and outside of their own country diplomatic immunities and privileges.[1] It was with express reference to their high office as international

[1] Article 24, paragraph 8, now Article 46, paragraph 4. See in this connexion the similar provision in Article 13 of the Convention relative to the International Prize Court.

judges that Descamps at the First Hague Conference demanded this peculiar status for the officiating arbitrators,[1] and in the deliberations of the Commission on July 17, 1889, the Belgian delegate, Count de Grelle-Rogier, expressly pointed out that thus far disadvantages had always resulted from the enjoyment by international arbitrators of those privileges.[2] If in spite of this the Commission promptly agreed upon the principle of the immunity of officiating members of the Permanent Court of Arbitration, the reason for doing so was that it saw a distinction between these judges, as an organ of the signatory powers, and free arbitrators appointed by two contending states. International law must not efface this distinction, but must rather examine whether the present legal status resting upon the similarity between the position of acting members of the Permanent Court of Arbitration and that of ambassadors corresponds to the actual needs of the case. In this connexion Wehberg says (although in other respects he neglects, in his excellent commentary upon the Convention for the pacific settlement of international disputes, to examine in detail the question in whose name the decisions at The Hague are really rendered) : [3]

> Is not the arbitrator the representative of the international community of nations in whose name he renders his decision, whereas the ambassador only represents the special interests of his own state ? It will easily be seen that in reality the position of an arbitrator is a more exalted one than that of an ambassador.

Wehberg follows this up with the demand that the limitations upon the diplomatic privileges granted to

[1] *Proceedings*, pt. iv, p. 150.

[2] See account of the said discussions in Meurer, vol. i, p. 274 et seq.

[3] Wehberg, op. cit., p. 83.

arbitrators be removed,[1] and their immunities be extended to the legal counsel. Furthermore, it would be exceedingly desirable that the arbitration tribunal should act under an international oath given in the name of the signatory powers as a body. For just as the judges of the International Prize Court must take a corresponding oath before the International Administrative Council, and as such an oath is also to be demanded of the judges of the Judicial Arbitration Court which it was sought to create at the Second Hague Conference, so it would be in keeping with the duties of those members of the Permanent Court of Arbitration who act as arbitrators in a given case to take it. The question whether the Permanent Court of Arbitration is an international institution or not, even if it can only act on the appeal of both parties, has furthermore a bearing upon the question whether and in how far the individual state has the right to recall for administrative reasons the judges appointed by it. In the case of a free arbitration tribunal the individual state can unquestionably forbid one of its subjects, who has been appointed as arbitrator by two other contending states, to accept that duty. The municipal effect of such a prohibition we need not here consider, since it is a question to be decided by the constitution of the individual state. Such an act, however, would not constitute in any way a violation of international law. But what is to be said when the question concerns a person who has been appointed for six years as a member of the Permanent Court of Arbitration at The Hague? Can his appointment be withdrawn at any time? Meurer thinks

[1] These limitations consist in the fact that the privileges are not given with the appointment of the arbitrator and during the time of the preliminary proceedings in writing, but may only be enjoyed outside his own country and not while travelling through third states.

that it is not a question of international law but of municipal law,[1] which shows that he has not at all rightly understood the problem. It would be quite possible that from the point of view of municipal law the appointment might be withdrawn at will, but that from the point of view of international law the state in question might not be in a position to do so. The Permanent Court of Arbitration is now an international judicial organ of the community of states, and for that reason it is a question of international law whether the judges appointed by the individual states to this Court can be recalled at will. Wehberg, who also takes up this question,[2] comes to the following conclusion. In principle, he says, every member of the Permanent Court of Arbitration may, until he has been appointed as arbitrator, be withdrawn at will by his own government from the list of judges, for up to that time he is only 'one of a list' and not an international judge. This idea does not seem to me to be to the point. When a person is appointed to the Court he becomes not only one of a list of judges, but one of a body of judicial officials, even if their jurisdiction is only optional and if the parties have the right to select from among these officials the judges who are to act for them in a given case. The mere fact that the contending parties are entitled to select their judges from this list does not give the individual states the right to alter the composition of this list at will at any time. Let us assume that state *A* has a dispute with state *B*, which the latter is ready to arbitrate through the Hague Court. Difficult questions are involved in which only a few jurists are well versed, one of whom lives in state *C*. State *A* desires to secure this jurist as its arbitrator and inquires of him whether he is ready to accept

[1] Meurer, op. cit., p. 267.

[2] Wehberg, *Kommentar*, p. 72.

a commission from it as arbitrator. State *B* hears of this and fears lest the arbitrator chosen by state *A* will be unfavourably minded towards it and will by his scientific authority determine the result of the award; accordingly it applies to state *C*, which is politically friendly towards it, with a request that the said jurist be struck off the list of judges. Perhaps it may even be a question of the personality of the umpire whom the arbitrators choose according to their good judgment, or who, in the absence of an agreement between them, is chosen by a third state,[1] and before the umpire has received his commission his name is stricken from the list of arbitrators by his own government at the solicitation of one of the contending parties which has reason to fear his influence. The exercise of such a right by state *C* could cripple the whole institution of the Permanent Court of Arbitration and greatly injure its judicial status. In my opinion that cannot have been the intention of the creators of the Court. At any rate, when Asser proposed at the First Hague Conference that the principle that the judges could be freely removed should be inserted in the international convention,[2] Descamps promptly and successfully answered him, and said that it was dangerous to grant such a right and thus overthrow the principle that judges are not removable. When a practical case arose, he said, they would know what to do. Descamps' warning was heeded and the question was left open, and the principle that judges could be freely removed was not adopted among the regulations for the Permanent Court of Arbitration. The removal of judges cannot, besides, be logically deduced from the nature of the Court. For in placing a name upon the Hague list of judges a state appoints a member of a court. Now

[1] See Article 24, now 45.

[2] *Proceedings*, pt. iv, p. 182.

the rule so generally prevails within the individual states that persons appointed to judicial offices cannot be removed that it was sought to introduce the rule into international law as well. There would hardly have been any purpose in having the Hague Convention extend the tenure of office of judges of the Permanent Court of Arbitration to six years if during this period a state could recall the judge appointed by it for whatever administrative or political reasons it chose. The only case in which the recall of a judge would not be considered a violation of the international duties imposed by treaty would be one in which the judge in question no longer fulfils the conditions under which he was appointed. We can only imagine him, indeed, as having lost his 'known competency in questions of international law' [1] as a result of a general intellectual decline which of itself would be a reason warranting his recall, since a self-evident condition of his appointment would be lacking; but he could readily lose his 'highest moral reputation' which the Hague Convention likewise makes one of the conditions of appointment. Moreover, as there are thus cases justifying a removal, and as there is for the present no jurisdiction authorized to decide whether the recall is just or unjust, we must make here as elsewhere a distinction in law between 'can' and 'may' in the sense that the recall is legally effective in every case as regards other states, but that it can only be made without a violation of international duty when the above-mentioned circumstances are present. When the parties to a given case appoint a member of the Permanent Court as arbitrator they do not thereby invest him with a judicial character, but merely confer upon him a com-

[1] For the conditions under which the judges are appointed, see Article 23, now 44.

mission to act in the specific case. The question we are discussing, however, is not that of taking from a judge his commission to decide a given case,[1] but of taking from him his character as an international judge. In the latter case it is, in my opinion, a matter of indifference whether the judge has received a specific commission to act or not. If the judges of the Permanent Court of Arbitration are to be freely removable by their own state, it seems to me that we must also concede the same right of removal even in cases where the judge has entered upon his functions under an appointment from a third state. For, as members of the Permanent Court of Arbitration, they are an organ of the international community no less before than after

[1] The removal of a judge from the list would be naturally followed by the annulment of his commission. Wehberg assumes that whereas an appointment as arbitrator properly protects the judge from arbitrary removal from the list, the contending parties themselves can remove judges designated by them upon the list even in cases when the said persons have been given a commission as members of an arbitration tribunal, the composition of which is not yet complete. In that case the commission of the judge would also expire. In my opinion it can only be a question whether either of the contending parties can by its unilateral act withdraw the commission from the arbitrators appointed by it before the arbitration tribunal is fully constituted, in order to appoint other persons. In other words, have the contending parties up to the time of the selection of the umpire a *ius variandi* with regard to the arbitrators appointed by them? In that case, for example, the state whose arbitrator will not carry out its wishes with respect to the person of the umpire can recall him and appoint another who is more compliant, although, according to Article 24, paragraph 3, now Article 45, paragraph 3, of the Convention, the appointment of the umpire is now in the hands of the arbitrators themselves. Even Wehberg would deny this possibility, for on p. 79 he says rightly that the arbitrators are commissioned by *both* parties even as regards the choice of the umpire. But if that be the case the commission of a judge cannot be withdrawn by one party upon its own initiative, and certainly not in cases where the appointment of the said person as arbitrator has been officially notified to the other party.

their appointment by the third state. Of course, their arbitrary recall after they have already entered upon their judicial functions under commission from a third state would constitute a very serious derangement of international procedure. On the other hand, even after the constitution of the arbitration tribunal, circumstances may make it necessary to dismiss an arbitrator because he no longer possesses the required qualifications for the position of an international judge. It is possible that an arbitrator who is acting under commission from two contending states may be found to be dishonourable. In that case, it seems to me the state which placed his name upon the list, thus making him a member of the organ of the international community, must promptly recall him.[1] The question whether the judges are removable or not shows us how significant it is whether the members of the Hague Court be merely regarded as names upon a list, as Zorn, Meurer, von Ullmann and Wehberg regard them, who obtain their position as international judges only after they have received a commission, and who even then may possibly, as von Ullmann thinks, be compared to free arbitrators, or whether the whole institution be regarded as a true judicial court, an organ of the community of states, which performs its functions in the name of the community of states under commission of the contending parties through members chosen by them. In my opinion the facts can be accounted for, not by the theory of names on a list, but only by the doctrine of the existence of an international judicial court. If the Permanent Court of Arbitration were merely a list of judges and not a judicial institution how could it have

[1] Another method of getting rid of such a person would be for both the contending parties to withdraw their commission from him ; see p. 59, note 1.

a registry and an Administrative Council? That fact as well as the designation of the whole institution and the provisions of the Hague Convention relative to it leads us to conclude that we have here a court of the international community which is to act in its name upon the concurrent summons of the parties, as a unit and with authority. The development of arbitration does not consist, therefore, as Meurer thinks,[1] in two points, first, that the parties are furnished with a list of suitable and available judges, and secondly, that if the parties cannot agree upon the selection the law comes to their assistance; but above all else this great progress has been made—that in the future disputes between states will be settled by an organ of the community of states upon the appeal of the parties.

Now in the establishment of the Permanent Court of Arbitration with the Administrative Council and the International Bureau, which are supported by the states as a body, we have unquestionably an international organization. The signatory powers have without doubt thus laid the basis of a new international union by the establishment of common organs. To be sure, when we turn our attention to the membership of this union, we find that it does not coincide with the membership of the family of nations. At the First Hague Conference twenty-six states from Europe, America, and Asia were represented; prescinding from the South African republics, the most important of which, the Transvaal, might well have been regarded as semi-sovereign, the South American republics were not represented.[2] But from the start the endeavour was made to get the other states to take part in the

[1] Meurer, op. cit., vol. i, p. 274.

[2] For the powers represented at the Conference, see ibid., p. 16 et seq.

Conference, and if the Convention for the pacific settlement of international disputes was, having in mind the Pope and the Transvaal, not declared 'open' in the sense that the unilateral declaration of the states not represented at the Conference was to be sufficient to constitute their adhesion, yet from the start an agreement upon the conditions under which those powers might take part in the Convention was contemplated in the treaty itself.[1] Moreover, by Article 26, paragraph 2, the institution of the Permanent Court of Arbitration was thrown open to disputes between other states than those which signed the Convention and to disputes between signatory powers and third states. From the beginning, therefore, the tendency was manifested to make the Hague institutions available for the entire body of states. In admitting from the start China, Persia, and Siam, advantage was taken of the opportunity of bringing about a timely expansion of the family of nations.[2] The First Hague Conference created within the family of nations a new union with the tendency to extend its scope over the entire circle of states subject to international law. The object of the new organization is, as the heading to the first title says, the maintenance of the general peace (*le maintien de la paix générale*), and as

[1] See Article 60 of the Convention.

[2] Concerning the gradual extension of the sphere of international law, see note 1 on p. 15. The admission of China, Persia, and Siam to the Hague Conference signifies, in my opinion, the adoption of these states into the family of nations. Even Huber (op. cit., p. 99, note 2), while he regards it as questionable whether Abyssinia, Morocco, Liberia, and Afghanistan can be counted as members of the family of nations, is of the opinion that China, Persia, and Siam are members, and he thinks rightly that the special rules of ex-territorial jurisdiction which hold good in these states are, since they rest upon denunciable treaties, at the present day of no further significance than other agreements in derogation of the common law.

this Convention for securing the general peace is the chief work of the Conference,[1] no more appropriate and descriptive name can be applied to this gathering of states than the term *Peace Conference*. It is a very interesting fact that the public sentiment which coined that name here again showed itself superior to diplomats and jurists. As President Staal stated in the second plenary session, the diplomats only adopted this name because the Dutch Minister of State, de Beaufort, had employed it in his address of welcome, and the Conference itself had used the term in its telegram of greeting to the Czar of Russia.[2] Since the name has thus become a technical designation of the Conference, and since the work of The Hague, although it evidently cannot immediately introduce an era of perpetual peace, is in its most essential features an organization for the object of maintaining the peace, German jurisprudence should likewise concede the correctness of this designation. But instead of doing so it is continually criticizing it. Zorn, as a citizen of the military state of Prussia, was so little in sympathy with the name 'Peace Conference' that in the following year, 1900, he would not admit the term into official usage, but chose instead the wholly colourless term 'Hague Conference',[3] which was entirely inappropriate because there have been so many other Hague conferences which have taken up isolated and wholly different technical international questions, such as the common regulation of the North Sea fisheries, the codification of international private law, &c.[4]

[1] See what has been said above, and in particular the citation from the concluding address of Baron Staal, p. 24.

[2] See Meurer, vol. i, p. 31.

[3] See Zorn in the *Deutsche Rundschau* of 1900, p. 123.

[4] Nippold, *Die Fortsetzung*, &c., p. 14, calls attention to this.

The Boer War, which Zorn characterized as the farce of the First Hague Conference, proves nothing against the hopes which optimistic idealists have placed upon the First Hague Conference for a new era of peace. Rome was not built in a day, and a political organization of the civilized world, which would actually secure peace through law, could not be completed at the First Hague Conference. There is always, as we have already pointed out above, an overlapping in the progressive development from one age to another, and for that reason no one will dispute the fact that the age of cannibalism is over although one savage still eats another in the wilds of New Guinea.[1] Even Meurer, who speaks of the Peace Convention as the most important part of the work of the Hague Conference,[2] is likewise, as a German, in spite of Kant, no friend of the term ' Peace Conference '. He finds it misleading. Above all, certain enthusiastic expressions in the address of welcome of the Dutch Minister, de Beaufort, almost conveyed, he thinks, the meaning that the Conference was to lay the basis of perpetual peace.[3] Yes, but did not the second official circular letter of the Czar, on January 11, 1899, expressly speak of the *idées de pacification générale*, and has not the creation of an international arbitration court brought us much nearer to the realization of these ideas ? Lammasch himself, who contributed in his own person so much to the peace work of The Hague, thinks

[1] The author is naturally not so foolish as to fail to recognize that war at the present day occupies a more prominent position in the life of states than cannibalism does in the life of individuals. But it occurs to him to point out that phenomena of that kind, which are inconsistent with the age, are somewhat typical in our community life, and that, therefore, the fact that a war can take place in spite of the beginnings of a peace organization does not tell against the hopes which we have expressed above.

[2] Meurer, op. cit., p. 34.

[3] Ibid., p. 31.

that the correct name should have been 'International Law Conference',[1] and Nippold also thinks that for jurists the Conference was primarily an international law conference, and that this name is preferable to all others and would have best designated the distinctive character of this and of all future Conferences.[2] But if the essential result of the Hague Conference is an organization in the interest of securing peace, why, it may be asked, should the term 'Peace Conference' not be the best imaginable one? The whole position which those jurists take with regard to the name of the Hague Conference merely shows that, owing to the fact that we Germans of the present day, in spite of all our military power, have so honestly kept the peace for more than a generation, and our Emperor William the Second in particular has personally made such great sacrifices for the peace, we have no understanding of the organization of peace. We owe, most unfortunately, our empire not to peaceful domestic effort but to war, and militarism is so embedded in our bones that the peaceful organization of the civilized world is no longer an ideal in our eyes. And those who are not of this view and consider the name 'Peace Conference' in itself desirable, as Nippold does, think that, in consideration of its opponents, they must avoid using it in the interest of peace. Neither German jurisprudence nor the German nation can profit by such lukewarmness. The fact that the Hague Conferences are called 'Peace Conferences' and nothing else is a reminder to the jurist and to his whole nation that the great goal of international law of the present day and the task of future generations consists

[1] Lammasch, in the *Ztschr. für internationales Privat- und Strafrecht*, vol. xi, p. 24.

[2] Nippold, op. cit., p. 14.

in the political organization of the civilized world. In the following pages we shall bring evidence to show that the beginning of this political organization has already been made at The Hague.

Section 4. The Theory hitherto held by Jurisprudence concerning the Legal Nature of the Hague Organization

We have shown in another connexion that while the more progressive spirits among German jurists rightly estimate the value of the Permanent Court of Arbitration for the peaceful settlement of international disputes, yet they have not comprehended in its full scope the significance in respect to organization of the union of states established for the same purpose. The legal nature of this union has thus far hardly been investigated at all. Let us examine for a moment, in this connexion, the opinions of German international law writers of the period subsequent to the First Hague Conference. Heilborn,[1] though it is to be carefully observed that he is speaking in connexion with the enumeration of the new laws of war which came to prevail in the nineteenth century, refers to the Hague Convention and adds the following words: 'In addition to this Convention which regulates the manner of carrying on war there was also signed at the Peace Conference a Convention for the pacific settlement of international disputes, which provides for the creation of a Permanent Court of Arbitration at The Hague, to which the contending parties can have recourse.' The fact that within the hitherto anarchical community of states a new union has been founded for that purpose is nowhere

[1] Heilborn in the Holtzendorff-Kohler *Enzyklopädie*, 1904, p. 990.

expressly mentioned, much less is the legal nature of this union examined. In his exposition of international law in the *Kultur der Gegenwart* von Martitz gives us, if nothing more, the following information: 'An organized international arbitration tribunal has been created, primarily for its members, by the great union of states which has come into being in accordance with the convention concluded at the Hague Conference on July 29, 1899. On December 31, 1905, twenty-five powers belonged to it.' [1] The author here speaks of the Hague organization at least as a new union of states which he compares to the numerous other unions, such as the international administrative unions, of which we have spoken above. Evidently no greater significance is attached by von Martitz to this organization than to the others. He does not see in it the beginnings of an international organization of the civilized world in the interest of peace. In the spirit of Prussian militarism he speaks the following epigrammatic words: 'International law originally grew out of war and still at the present day stands and falls with war, and the idea that with the means and forms which war guarantees the abolition of war can be brought about in a legal way, or even prepared for, is nothing more than a dream.' [2] Whether this view be correct or not the future will tell us. But at any rate von Martitz is wrong when he says further: 'The international foundations of our state system are, as far as we can look into the future, fixed, indestructible, and unalterable.' In this respect von Martitz has already been refuted by history. The establishment at The Hague, in the year following the publication of these lines, of an

[1] Von Martitz in the *Kultur der Gegenwart*, section devoted to jurisprudence, 1906, p. 460.

[2] Op. cit., p. 491.

International Prize Court, before which the private individual can summon the foreign state as before an authoritative tribunal, makes it clear that von Martitz' assertion that the foundations of international law are fixed, indestructible, and unalterable has come somewhat sharply into conflict with actual facts. At no time since international law has existed as a separate branch of law has it gone through so rapid a process of development, through such revolutionary changes, as within recent years. To deny this is to be simply out of touch with the times. The excellent text-book on international law by von Liszt, in spite of the progressive spirit in which it is written, likewise gives too little consideration to the organization created at The Hague. In his exposition of the history of international law the author marks indeed the First Hague Conference as the beginning of a new period of international law, but he only says that, prescinding from the progress made in the humanizing of war, 'a Permanent Court of Arbitration was established which makes it possible to settle disputes between states in a legal way'.[1] Here again the most important achievement of the First Hague Conference, the organization of the community of states for the maintenance of peace, is not once mentioned as such.[2] Similarly, in the doctrinal part of his work von Liszt fails to give us a strictly juristic estimate of the union founded at The Hague. In section 17, under the heading of the organs of international administrative unions, the Bureau of the Permanent Court of Arbitration and its Administrative Council are treated of for the first

[1] Von Liszt, *Völkerrecht*, 6th ed., 1910, p. 31.

[2] This is all the more extraordinary since in other places we find von Liszt describing, although not with legal precision, what the organization created at The Hague means for international law; see above, p. 33.

time.[1] We are told that this Bureau is to serve as a registry for the Permanent Court of Arbitration, but the Court of Arbitration itself is not the international organ mentioned in this connexion, evidently because, in view of its judicial functions, it is entirely out of place in an administrative union. On the other hand, the Court of Arbitration itself is treated of in the succeeding paragraphs under the heading of international courts without anything being said of the legal nature of the union which maintains the Court of Arbitration.[2] It is obvious that this doctrinal exposition is unsatisfactory. The most important institution of The Hague union is, indeed, the Court of Arbitration itself, which must be estimated in connexion with its auxiliary organs. When that is done it naturally becomes possible, as was said above, to consider the entire union as an administrative union. When, finally, von Liszt in another place says that a permanent and general organization of the international community is still lacking,[3] he is correct to the extent that the Hague organization, which we are told has from the start manifested an inherent tendency to gain an ascendancy over the entire international community, though it is a permanent organization, yet is not at the same time a general [4] organization; but, at any rate, von Liszt can at the present day no longer say [5] that the idea of an assembly of states, whether permanent or meeting from time to time, has a place only in the Utopian dreams of those authors who have visions of a world state. On the contrary, the periodic conferences at The Hague in the form of an assembly of states meeting from time to

[1] Von Liszt, op. cit., p. 144.
[2] Ibid., p. 150.
[3] Ibid., p. 135.
[4] That is to say, embracing all spheres of international life.
[5] Op. cit., p. 136.

time have been for years the desire of many scholars and diplomats from whom Utopian ideas are far removed.[1] As in von Liszt's systematic exposition of the whole body of international law, so in von Ullmann's very detailed text-book we can find no estimate of the Hague organization which is in any way satisfactory. In the historical review of the development of international law nothing is said concerning the significance of the Hague Conferences for the organization of the community of states, and he too fails to give us a direct estimate of the development of procedure in international disputes.[2] In his treatment of associations of states of a non-political character we read only of the international administrative unions.[3] In another place the international offices of these administrative unions are referred to and among them is mentioned last of all the International Bureau of the Permanent Court of Arbitration with its Administrative Council.[4] No mention is made of the Court of Arbitration in this connexion. This is treated of under international courts, but we have no mention at all of the union to which this institution appears to belong.[5] Von Ullmann thus makes the same mistake as von Liszt. The most important organ of a unique organization is forcibly torn from its place, in order that this organization may be placed in a category to which it does not belong. And the Court of Arbitration itself then swings loose in the wind. Even in the special works of German jurisprudence upon the subject we find no legal examination of the nature of the organization created at The Hague. Meurer in particular, who rather gives us an historical sketch of the development of the rules adopted at The Hague, and does not con-

[1] See below.
[2] Von Ullmann, *Völkerrecht*, 1908, pp. 81, 82.
[3] Ibid., p. 94.
[4] Ibid., p. 238.
[5] Ibid., p. 239.

secrate the important part of his work to the doctrinal study of the individual provisions of the Hague Conventions, omits all discussion of the subject. In view of his whole idea of the judges of the Court of Arbitration as mere names upon a list, and of his failure to recognize the fact that decisions will be rendered by the court in the name of the community of states, this neglect is quite intelligible. But even Nippold, in his epoch-making book upon the development of procedure in international disputes, gives no consideration to the problem before us. He thinks that he must take occasion to state that all those who dream of a political organization in connexion with the further development of international procedure are running counter to the fundamental principle of international law of the present day, and that all the projects directed to that end must therefore be described from the point of view of the present day as Utopian dreams.[1] The idea is here negatively expressed that arbitral procedure, as it exists at the present day, i.e., the organs created to that end, is in no way to be considered as a political organization of the nations. Meanwhile I can find in Nippold's work no positive opinion upon the actual legal nature of the judicial organization adopted at The Hague.[2] Wehberg himself, who of all the German writers on international law is most in sympathy with pacifism, has thrown no light upon the question, how the organization created at The Hague is to be interpreted from a strictly juristic point of view. We meet in his works more than once with the remark that a world federation does not

[1] Nippold, op. cit., p. 156.

[2] It may be remarked here that even the achievements of the Second Hague Conference have apparently given Nippold no ground for revising his point of view upon this question. Compare in this connexion his recent work upon the Second Hague Peace Conference.

exist,[1] but he makes no positive attempt in any way to define and classify the work of The Hague juridically. The earlier-mentioned study by Huber concerning 'the sociological foundations of the community of states',[2] arrives, it is true, as was said above, at the result that the institutions created at The Hague indicate in a certain sense the beginnings of an international organization of the community of states, but, as the title of the essay indicates, the investigation proceeds rather from a sociological than a strictly juristic point of view, and accordingly no tangible result as to the legal nature of The Hague organization is reached. The earlier-mentioned study by Oppenheim, *Die Zukunft des Völkerrechts*, rightly finds, it is true, in the creation of the Permanent Court of Arbitration at The Hague and in the permanent Bureau annexed to it the beginnings of an organization of the community of states, but it fails to give any juristic interpretation of the institutions created. Oppenheim merely points out that the plan of a political organization, under which he includes a federal organization, must be rejected; the coming organization must, he says, be a unique one, and it is at present impossible to sketch the plan of this organization even in its bare outlines.[3] The whole body of foreign literature, so far as it is accessible to me, is likewise silent upon the question.[4]

[1] Wehberg, *Kommentar*, p. 8, and *passim*.

[2] Huber, *Beiträge zur Kenntnis der soziologischen Grundlagen der Staatengemeinschaft* in the *Archiv für öffentl. Recht*, vol. iv, p. 56 et seq.

[3] Oppenheim, op. cit., pp. 20–21.

[4] Among French works which take this negative attitude, I may mention in particular the following: Nys, *Le droit international*, Brussels and Paris, 3 vols., 1904–6; Bonfils, *Manuel de droit international public*, revised and augmented by Fauchille, 6th ed., Berlin, 1904; Mérignhac, *Traité de droit public international*, 1905 and 1907; De Lapradelle and Politis, *La deuxième Conférence de la Paix*, in the *Revue générale de droit*

This attitude is quite consistent with the fact that many authors who can appreciate in the abstract the significance of the Hague Conferences for organization, nevertheless subscribe to the theory of the Permanent Court of Arbitration as a mere list of judges.[1] In this way the most important organ for the judicial organization created at The Hague is set aside, and it no longer remains possible to classify this organization in a correct juristic way. It thus happens that even Lawrence treats of international arbitration under the heading of war, and fails completely to investigate the legal nature of this institution.

international public, Paris, vol. xvi, 1909, p. 385 et seq. ; and the French translation by Scelle of the Spanish work by Bustamante y Sirven, *La seconde Conférence de la Paix*, in 2 vols., Paris, 1909. Equally unsatisfactory from this point of view are the English works by Hall, *A Treatise on International Law*, 6th ed., Atlay, Oxford, 1909 ; Lawrence, *The Principles of International Law*, 4th ed., London, 1911 ; and Higgins, *The Hague Peace Conferences*, Cambridge, 1909. The same is true of the American works by Holls, *The Peace Conference at The Hague*, New York, 1900 ; Wheaton, *Elements of International Law*, in the 4th (English) ed., by Atlay, London, 1904, and Taylor, *A Treatise on International Public Law*, Chicago, 1901. Concerning the attitude of James Brown Scott, see below. The Roosevelt Professor, Paul Reinsch, in his above-mentioned valuable book, *Public International Unions*, Boston and London, 1911, speaks, to be sure, of the 'general international union represented by the Hague Conferences' (p. 122) ; he thus appears to admit, as von Martitz does, the existence of a special union of states created at The Hague, but he unfortunately limits himself to a discussion of the administrative institutions of this union.

[1] See, e.g., Lawrence, *The Principles of International Law*, 4th ed., London, 1911, p. 582. Here it is said of the Hague Court that 'strictly speaking it is not a court, but only a list from which courts can be formed as required'. I refer to Lawrence in particular, because he has emphasized so energetically the value of the work of The Hague for organization ; cf. above, p. 38.

Section 5. Union or World Federation ?

In the preceding pages we have endeavoured to study more closely the judicial organization of The Hague as created by the First Conference, and have been obliged to state that the legal nature of this organization has thus far not been studied by the science of international law. In our endeavour to make up for this neglect it seems to us that the correct method to follow will be first to examine whether we can include the new union in one of the categories of international unions at present in existence. The problem presented, therefore, is whether this judicial organization is a union similar to the international administrative unions, or is the world federation which the philosophers and pacifists, and indeed many international law jurists, have striven for ?

Strangely enough, the Hague Conference itself gave no name to the organization it created. That also is a fact which to my knowledge no German scientific writer has thus far taken into consideration. The judicial organization which was created at The Hague is not to be described as a ' union ' in the same sense as the other administrative unions. This fact is all the more striking in that in many respects the administrative unions served as a model for it. For the International Bureau of the Permanent Court of Arbitration at The Hague is just such an official body as those regularly established for the administrative unions after the pattern of the central offices of the International Telegraph Union and the Universal Postal Union. That it was modelled after previously existing types is evident from the fact that the scheme of apportionment of the expenses of the Bureau is the same as that of the inter-

national bureau of the Universal Postal Union.[1] The Administrative Council, consisting of the diplomatic representatives at The Hague as a separate body of officials, independent of the territorial jurisdiction, who are entrusted with the supervision of the International Bureau, is likewise nothing less than the 'international commission' which we meet with in the International Union for Weights and Measures and in the Union for International Sanitation. Choice was rightly made of this method of supervision which had already been recognized as the most suitable for the international administrative unions, because under this system the central office is the better withdrawn from the exclusive power of the state in which it is domiciled than in the case of the system of 'directing states'. Instead of following the precedent of placing the Berne Telegraph Bureau in both its divisions, and the Bureau of the Universal Postal Union, and the United Central Offices for the Protection of Industrial and Literary Property under Swiss supervision, and the Brussels Bureau for the Publication of Customs Tariffs and for the Suppression of the Slave Trade under Belgian supervision, in the Permanent Administrative Council Holland was merely given the position of *primus inter pares*, in that, as has been said, the Netherland Minister of Foreign Affairs for the time being acts as president. The judicial organization created at The Hague likewise corresponds to the international administrative unions in the fact that it was not restricted in advance to a group of states, whether world powers, great powers, or the states of Europe, but was held open from the start for the adhesion

[1] Reinsch, op. cit., p. 122, calls attention to the connexion between the organization of the Hague institutions and that of the previously existing administrative unions. He likewise gives, on p. 143 et seq., an excellent review of the typical structure of those special unions.

of other states, although a distinction was made between those which could adhere without further formalities, because they had been invited to the Peace Conference, and other states which had not been invited, because it was believed that an agreement must first be reached upon the conditions under which the latter should be allowed to adhere. It is true, indeed, that the international community which was created by the judicial organization of The Hague can, before the Second Hague Conference admitted all the South and Central American states into this union, be compared in its scope only with the Universal Postal Union. In view of the analogies between the international administrative unions and the international judicial community founded in 1899, one might accordingly be inclined to see in the work of The Hague a special union which is distinguishable from the administrative unions only in the fact that the object in view in this case was a judicial one. This opinion, as was said above, is also held by certain scientists.

Meanwhile, this idea cannot possibly do justice to the nature and significance of the great civilizing work of The Hague. The union here organized is in no way a union dealing with a special field of the activity of the state which, like the postal and telegraph service, needed international regulation; and the Conference rightly avoided giving to the child which it brought forth the name of *union pour* . . . The work of The Hague is conspicuously political in character. This was, strangely enough, not at all understood at first in the official circles of Germany, and even on the occasion of the Second Hague Conference, when the struggle over obligatory international arbitration took place, it was not understood in its full extent. Up to the time of that crisis of the First Hague Conference, which

was brought about by the directly hostile attitude of the German Empire towards the project of the Permanent Court of Arbitration, and which was only settled to the honour of our Fatherland and to the good of human civilization by the bold refusal of the technical delegate of Germany, Professor Philipp Zorn, to have the 'imperial mandate' read at the final session of the committee of examination, it was actually possible that the whole problem had been handled only by the third division of the foreign office at Berlin, which was entrusted with affairs of a juristic nature. When, since the beginning of the imperial ministry of foreign affairs, has there ever been an affair which so closely concerned 'political policy' as the organization of the world Arbitration Court? In the whole history of mankind no more brilliant assembly ever met to consider the possibility of establishing a permanent court which should decide disputes between states upon the basis of law and equity. The assembly was a Peace Conference, and if from the start it was not summoned to meet as such, yet, as has been said above, the Conference itself adopted this name which public opinion gave it. As was said in the admirable address of the president of the Conference, Staal, the whole content of the Convention for the pacific settlement of international disputes is summed up in the heading of the first title: *Du maintien de la paix générale.* It was desired to restrict the danger of war by the erection of a permanent judicial court. Now it is characteristic of war that the whole existence of the state is placed at stake. Not only does war murder men, to use Homer's expression, but under certain circumstances it murders the state itself. Even at the Congress of Vienna, where the principle of legitimacy was completely dominant, the great powers refused to consent to abolish

the legal principle that in case of *debellatio*, when the enemy can no longer assert himself at any point of his territory, an annexation of the entire enemy territory can take place without a cession of any kind. It must be carefully observed that under this principle the outbreak of a war may result in the complete destruction of third states which have not been parties to the dispute between the original combatants, but who in consequence of a treaty of alliance have been drawn into the war. But more than that, in our age of international commerce, even those states which can succeed in maintaining complete neutrality are seriously injured by a war. The financial crisis which regularly accompanies the modern war will undoubtedly also affect neutral states; their industrial life may be brought to a standstill thereby, and thus grave dangers for the domestic welfare of the state may result. In short, there exists a common political interest between all the powers that the great convulsions of their domestic life brought about by war should be prevented. In recognition of this fact a permanent court for settling disputes between states was established in order to limit, as far as possible, such dangers for the existence of states; and in doing so an organization was created which affected the state in 'its entire personality', in 'its whole existence', in 'its national political aims', in 'its self-preservation', which affected the 'national integrity and inviolability'. But those were the very conditions under which, as already shown above,[1] the prevailing theory of German public law considers a community of independent states with common organs for the accomplishment of the objects of the treaty, a federation. And this would seem to be proof that the end of the nineteenth century has brought us, in the work

[1] See above, p. 21.

of The Hague, a world federation, and that the era of disorganization has thus been succeeded by a new era of the world's history. Whether the new bond between the states was called a world federation or not is irrelevant; it is not the affair of practical statesmen, who had the final word to say at The Hague, but it is the affair of jurists, who must classify the new bond under one of the categories of public law, or, if that cannot be done, must create a new category for the newly-established political union. The latter is not necessary in this case, as all the elements of a federation of states are present in this union. As was said above, I myself have endeavoured in another work to characterize this development as a world federation, and in that connexion I said that the world federation would be complete when there would be a legal guarantee for the periodic meetings of the Hague Conferences;[1] I must now examine the problem anew and correct myself in this respect, that however much these periodic meetings are to be desired, nevertheless, the conditions of a federation of states have already been fulfilled. For the community of states, as was shown above, no longer lacks the common organs for the fulfilment of the ends of the association, and the periodical Conference would be after all merely an

[1] Schücking, *Die Organisation der Welt*, p. 80. James Brown Scott comes to a similar result, op. cit., vol. i, p. 750, where he says: 'The form is nothing; the substance is everything, and the uniformity produced by international conference and decision differs so little from the uniformity resulting from a federation as to be negligible. An international conference meeting at regular stated intervals, in which nations large and small meet on a plane of equality to discuss questions of universal importance and to legislate *ad referendum*, offers the advantages of federation without its disadvantages.' In the following paragraphs, to be sure, he expresses the opinion that the idea of a federation requires the establishment of an executive power, and that at the present day this would be a problem teeming with difficulties.

organ of something already in existence; it is accordingly irrelevant from a juristic point of view whether or not the holding of the Conference is conditioned in each case by a new agreement of the parties. It is also incorrect to say, as Huber does, that the community of states is still anarchical because the holding of the court in each case is conditioned by the assent of all.[1] So long as arbitration is still optional, the functions of the Court of Arbitration will be above all dependent upon the will of the contending powers; if they appeal to the court it will decide, as I have explained above, in the name of the community of states without any necessity on their part to declare their assent in each particular case. That is the best evidence that there are actually permanent organs at hand within the community of states. To refute Huber completely let us examine once more how a federation of states is characterized in the best-known German work upon the state, namely, Jellinek's *General Theory of the State*, and let us then test whether the work of The Hague satisfies this definition. The definition reads: 'A federation of states is a permanent contractual union of independent states for the object of protecting the federal territory against attacks from without and of securing domestic peace between the federated states, as well as for the attainment of other specified objects. This union calls for a permanent organization for the realization of the ends of the federation.'[2] It will be observed, first of all, that the motive for the federation of states is put in the foreground, as is also the case in other definitions of a federation—the protection of the territory of the federation against attacks from without. The complete absence of this motive from the

[1] Huber, op. cit., p. 96.

[2] Jellinek, *Allgemeine Staatslehre*, p. 697.

organization of The Hague is of course self-evident, since the union is made up of the states of the whole world, including China, Persia and Siam, which were represented at the First Hague Conference.[1] As regards the states of Lichtenstein, San Marino, and Monaco, which were not included on account of their small size, or as regards Liberia, Abyssinia, and Morocco, which are regarded only as semi-civilized, as are also Afghanistan, the independent states of the Himalayas, Bhutan and Nepal, and certain small independent quasi-states in Arabia, whose very names are not known to the educated European, there is no need of bringing them into an association for common defence. It is in the very nature of a 'world federation' that this test of a federal organization must be completely lacking. The same is true of the demand made, not by Jellinek, but by other writers, that a federation must have a common diplomatic corps. Is it to be really necessary to constitute a world federation that this organization must maintain diplomatic relations with Lichtenstein, San Marino, and Monaco? To raise this question is to answer it. For those states were not invited to the negotiations of The Hague precisely for the reason that their existence was of too little concern in international life. The same is true also, *mutatis mutandis*, of those few other states which were not invited because of their exotic character. If the test of mutual relations of peace and of war with other nations is to be applied to every federal organization, an

[1] It is a matter of no consideration here that the states of Central and South America were not present at the First Hague Conference. Nevertheless, as Beernaert points out in his opening address before the first commission, on May 26, the representatives of almost the whole civilized world were gathered together, and from the start there existed the tendency to extend to the entire civilized world the union for the Court of Arbitration.

entirely new juristic concept must in that case be found for the organization of the civilized world. Setting aside the fact that, as was said above, it is more systematic to classify as far as possible a new political institution under existing categories, the concept of a world federation is already familiar in international law, at least as a postulate. The second test of a federation laid down by Jellinek, namely, 'to secure peace within the federation,' is even more evident in the work of The Hague. That this aim to secure peace within the federation cannot as yet be unconditionally and absolutely attained by the work of The Hague, that the nursling of the pacifists cannot within a few weeks be brought to complete maturity, is self-evident to all thinking men. Optional arbitration is a weak infant as against the giant armies of the nations, but that does not prevent it being the goal of the organization 'to secure peace within the federation'. And as the possession of permanent organs for the realization of the aims of the federation distinguishes it from an alliance, all the tests of a federation, in so far as they can be applied to a world federation, would seem to be fulfilled. It remains now to examine the most important point, namely, the element of permanence, which Jellinek considers a further essential of a federation. Huber makes use of this argument also to prove the anarchical character of the community of states.[1] To be sure, the whole organization does as a matter of fact rest merely upon a treaty which may be denounced. But is it really necessary to a federation that it be entered into 'in perpetuity'? First of all it must be answered that even if such an agreement were entered into between the participating states, nevertheless so long as the federation were one of sovereign states, each state must have the

[1] Huber, op. cit., p. 96.

right to leave it under circumstances. 'A sovereign state can in general not be bound unconditionally and in perpetuity.' [1] We must be careful not to overlook the difference between a relationship which is created by a treaty expressly concluded for an unlimited period, and which in consequence can only be legally denounced under very special conditions, and the Hague Arbitration Convention which expressly provides for the right of denunciation. On the other hand, there is an important difference between an alliance or a commercial treaty between two states, which, as experience shows, is dependent upon every change in the political situation, whether it be the person of the monarch, or the majority in Parliament, or altered circumstances, and the treaty which provides for an international court of arbitration. The latter institution is unquestionably regarded as a permanent one, and if the states thought that in this case a free right of withdrawal must be provided for, too much importance must not be attached to the practical effect of this provision. In this connexion precisely the same thing is true of the Hague organization which Jellinek says of the international administrative unions:

> Although all these unions are limited in point of time, either expressly or in the fact that the right of denunciation is granted, still it is clear that, by reason of the nature of the relations promoted by the union, in most cases a permanence will be ascribed to the union in the sense that if it breaks up another union with the same or similar tendencies must take its place. To do away with the Postal and Telegraph Unions entirely without creating others for the same purpose would merely result

[1] So Jellinek speaks in *Die Lehre von den Staatenverbindungen*, p. 175; see in this connexion the carefully reasoned treatise of Erich Kaufmann, *Das Wesen des Völkerrechts und die Klausel rebus sic stantibus*.

> in making the intercourse of the world unnecessarily difficult, which would be equally against the collective interest of the civilized world and against the separate interest of the individual states. It is less by reason of their formal bases than by reason of the permanence of their aims that these unions are to be called perpetual.[1]

Those international administrative unions, although their permanence is not juristically secured 'in perpetuity', could never be compared under the prevailing theory to federations, and only distinguished from them by the absence of a political character, if it were essential to a federation that it be concluded for an indefinite period and that the right of denunciation be renounced. In both cases the question turns on the point whether, as Jellinek has so well expressed it, 'a permanent aim' is present. Who can doubt the presence of this permanent aim in the case of world arbitration? Here, as in all other cases, law and life go hand in hand. Is it not safe to assume that states will draw nearer and nearer to each other, since the new age of international commerce has but just begun? In view of the growing private and public internationalism,[2] of the increasing significance of the pacifist movement even here in Germany,[3] we can only advance, not retreat, here as elsewhere, and it would seem to be as impossible for a civilized state to withdraw from the Hague Arbitration Convention as from the Universal Postal Union. The Second Hague Conference with reason discussed merely

[1] Jellinek, op. cit., p. 165.

[2] I need only refer here to the recently founded Union for International Understanding started by Professor Otfried Nippold and myself.

[3] See on this point the *Annuaire de la vie internationale*, Brussels, 1908–9, in particular the article by Fried, 'Science and Internationalism,' and the new work by P. H. Eijkmann, *L'internationalisme scientifique*, Hague, 1911. See also Fried, *Das internationale Leben der Gegenwart*, Leipzig, 1908.

the development of the judicial organization, and no one questioned the value of the institutions created in 1899, nay, even the German delegate declared that Germany had erred in her original attitude of opposition to optional arbitration. By declaring in the Hague Convention of 1899, as had first been done in the Postal and Telegraph Conventions, that the denunciation should only be effective with respect to the power making it, no term being assigned to the Convention, the Conference left no doubt that it was creating another kind of institution. In spite of the right of denunciation, which, as was said above, can never absolutely be excluded from a federation of sovereign states, we see, therefore, in the work of the Hague Conference a permanent federation of states which, assuming that the other requisites have been fulfilled, satisfies the essentials of a federation, although the Convention has not been expressly concluded in perpetuity.[1] Finally, the fact that the element of the independence of the contracting parties is present in this union of states which has been brought about by the work of The Hague in 1899 needs no further amplification; evidently we have here merely a legal relationship which has been created between the states, not a new juristic person placed over them. This is especially evident from the fact that each state has the right on its own account to bring the legal relationship

[1] The possibility of a federation limited in point of time is also recognized by Jellinek, *Die Lehre von den Staatenverbindungen*, p. 174, if the federation is concluded for a long period; in his *Allgemeine Staatslehre* Jellinek requires, as was said above, merely a permanent union of states, without saying in detail what he means by that. In this connexion we must mention also that Rehm, op. cit., p. 102, waives the test of long permanence of the federation. Rehm says: 'Ordinarily a comprehensive union (federation in contrast to alliance) contemplates a greater permanence, nevertheless, this is not essential to the idea.'

to an end by denouncing the Convention, although, as was said above, the Convention continues in force between the other states. This is what distinguishes the world federation from a federal state.

I believe that I have now proved my thesis that in the year 1899 the Hague Conference, although not *expressis verbis*, yet *implicite* and *ipso facto*, created a world federation. We are well aware, of course, that one who starts out with other views of the legal nature of a federation will probably come to another conclusion. Those who, like Georg Meyer, Hänel, von Martitz, Brie, Ulbrich, von Stengel, and Le Fur, think that a world federation involves a political authority, and those [1] who, like Georg Meyer, Brie, and von Stengel, consider that the members of a federation lose something of their sovereignty, can hardly look upon the organization of The Hague as being a federation. But it is otherwise when one considers a federation as owing its existence to an international treaty, as Laband [2] first of all, and afterwards Jellinek in particular, has done. The latter view of the nature of a federation is rightly described by Anschütz as the prevailing one.[3] It was not my intention, in view of the 'almost limitless' [4] literature upon the federation and the federal state, to raise the controversy once more; rather, it is sufficient that I have brought proof to show that when the juristic idea of federation is understood as it is in Germany according to the prevailing theory, the work of The Hague must be pronounced a world federation.

[1] Concerning this controversy see Meyer-Anschütz, *Deutsches Staatsrecht*, p. 39 et seq., together with notes and quotations.

[2] Laband, *Staatsrecht des Deutschen Reichs*, 4th ed.

[3] See Anschütz in Meyer-Anschütz, p. 40, note 2; see also the same author in von Holtzendorf-Kohler's *Enzyklopädie*, p. 462.

[4] So Jellinek rightly says, *Allgemeine Staatslehre*, p. 697.

This point is all the more important in that German science undoubtedly occupies the leading place in the scientific exposition of the concept of federation and federal state.[1] For this reason persons outside of Germany also will be inclined to see in the organization of The Hague a *Confédération d'États*, as the confederation of the Rhine was first called, when that appears as a consequence of the prevailing theory in Germany upon the nature of a federation; and it will be recognized that von Ullmann is not correct when in his exposition of international law,[2] written as late as the year 1908, he says that the practical realization of this form of state union has thus far been limited in history to such states as were bound together by important political ties (nationality, traditional association). Rather, at the time when von Ullmann made this assertion the hope had already been realized, which was once expressed by Martens, that with the progressive development of international relations an organization of the international community after the type of a federation might perhaps be expected.[3]

[1] To this effect speaks Jellinek, ibid. The same argument is made by Rehm, op. cit., p. 107, who points out in particular that the great work by Le Fur, *L'État fédéral et la Confédération d'États*, Paris, 1896, is in its doctrinal part based exclusively upon the results of German investigation.

[2] 2nd ed., p. 94.

[3] Fr. Martens, *Das internationale Recht der zivilisierten Völker*, 1886, translated into German by Bergbohm, vol. i, p. 239.

CHAPTER III

THE DEVELOPMENT OF THE WORLD FEDERATION RESULTING FROM THE SECOND HAGUE CONFERENCE

Section 1. Its Extension and the Completion of its Judicial Organization

Let us consider first of all what the union created at The Hague in 1899 lacked in comparison with the ideal of a world federation which would involve the complete organization of the international community. First of all, as was said above, the union of 1899 did not coincide with the family of nations; for it was an organization merely for judicial objects, while the community of states still remained anarchical in respect to its other common interests, in so far as the international administrative unions did not satisfy those needs. Finally, this judicial organization itself was embryonic to the extent that the jurisdiction of the Permanent Court of Arbitration depended in the individual case merely upon the will of the parties, and, moreover, the composition of the arbitration tribunal was effected merely by the contending parties. The knowledge of these deficiencies furnished us at the same time the lines along which the development of the world federation at the Second Hague Conference was to proceed. Let us now first of all examine in how far the Second Hague Conference followed these lines of development. The question of the states which were to compose the union, i.e., the extension of the union to the entire circle of the family of nations, was quickly settled. Instead of twenty-

six states which took part in the First Peace Conference,[1] there were forty-five [2] represented at the Second Conference, and they later signed the new draft of the Arbitration Convention, the magna charta of the world federation.[3] All of the recognized members of the international community, including China, Persia, and Siam, were invited this time and only Costa Rica remained away.[4] The absence of Lichtenstein, San Marino, and Monaco did not affect the universality of the world federation. The principle, *prætor non curat minima*, evidently holds here as it held for the international union founded in 1899. Likewise the nature of the international community is sufficient to explain the fact that Liberia, Abyssinia, and Morocco, Afghanistan, and the independent Himalayan states, Bhutan and Nepal, as also the independent quasi-states in Arabia likewise received no invitation to the Second Hague

[1] By the separation of Sweden and Norway the twenty-six states had become in the meantime twenty-seven. In accordance with Article 60 of the Arbitration Convention, the powers represented at the first Conference signed on July 14, 1904, a protocol defining the conditions on which the powers not represented at the Conference might accede to the Convention. The majority of these states acceded to the Convention the day after the opening of the Second Conference, and the rest some days later.

[2] Only forty-four powers are as a rule mentioned as participants. This is due to the fact that the representatives of Honduras, because of a revolution which had broken out in that country, were at first not admitted to the Conference on the ground of not having full powers. Towards the end of the Conference, however, they obtained admission, so that there were then in fact forty-five participants.

[3] Of all the participants at the Conference Nicaragua was the only one which had failed to sign the Convention before the close of the Conference ; but by a declaration of December 16, 1909, made in accordance with Article 93 of the new draft of the Convention, Nicaragua made good that failure.

[4] Article 93 of the Convention authorized the subsequent accession of Costa Rica, since that state was among those invited.

Conference, for they have thus far been considered as half-civilized and are not recognized as being legal subjects of international law. But if the powers should desire to admit one or other of these peculiar states into their concert, Article 94 of the Arbitration Convention furnishes them the legal basis for so doing. This article reads:

> The conditions on which the powers not invited to the Second Peace Conference may accede to the present Convention shall form the subject of a subsequent agreement between the contracting powers.

To admit these states into the Hague organization would, as in the case of China, Persia, and Siam, be equivalent to a recognition of their fundamental equality as subjects of international law.[1] Morocco will never be able to advance this claim for admittance into the international community, since recent events have robbed it of its sovereignty and have made that country a vassal state subject to France. Moreover, the political fate of Abyssinia, Afghanistan, and the Himalayan states is still too uncertain to make it possible to say whether they will in the end be

[1] This would not *ipso iure* suppress the rules relating to ex-territorial jurisdiction; see above, p. 62, note 1. Moreover, it would appear from recent events very doubtful whether Persia will be able to maintain its position within the world federation. In the year 1907 Great Britain and Russia concluded a treaty in which Northern Persia was declared to be a Russian 'sphere of influence' and Southern Persia a British 'sphere of influence'. Nevertheless, in spite of this, Central Persia continued to be a sovereign state. Recently, however, it appears that both those powers have altered their intentions in this respect, and have determined that Central Persia shall henceforth be at most merely a subordinate state under their common control. If, according to press reports, Persia has now actually been forced to enter into a treaty providing that no foreign citizens shall be appointed to its domestic service without the consent of Great Britain and Russia, she has as a matter of fact already lost her sovereignty, and could no longer claim a right to be admitted to future Hague Conferences.

able to maintain their independence, which is the primary condition for their recognition as subjects of international law. The same is true of the negro republic, Liberia, which in other respects would have the best claim to be admitted into the family of nations, because this state in spite of the inferiority of its civilization, has strangely enough been recognized by the older states as a subject of international law through separate treaties.[1]

After all, if, as is to be expected, all those powers which signed the Arbitration Convention as it was drawn up by the Second Hague Conference should ratify this act,[2] the group of participants in this union would now, with the exception of Costa Rica, coincide with the group of the family of nations; and in so far as regards the states which compose it, the previously unorganized international community will have changed into an organized world federation.

The second defect of the world federation as it was constituted in 1899 is to be found in the limitation of its work to judicial procedure between the states, and we now ask ourselves the question whether the powers at the Second Hague Conference did not possibly assign to their union certain tasks of international administration. It was thought, however, in 1907 that that idea must be given up, and instead the Conference limited itself to the

[1] See upon this point Heilborn in von Holtzendorf-Kohler, p. 981. The general reception of the negro republic, Liberia, as a subject of international law would mean an important strengthening of the position of the black race, which at the present day is represented only by the negro republic, Haiti, and possibly by the mulatto republic, San Domingo, both of which are recognized as fully qualified subjects of international law.

[2] This ratification has thus far not become general. For a list of the states which up to the year 1911 had ratified the Convention, see Wehberg's *Kommentar*, pp. 2 and 3.

development of an international judicial organization. It is easy to understand why it did so. In the history of the world the individual states confined for hundreds of years their political organization to the maintenance of domestic law and to the defence of their territory against attacks from without (an object evidently unsuited to a world federation), in particular the state of the Middle Ages was for a long time exclusively occupied with keeping peace, just as the world federation has for the present merely proposed as its object the maintenance of the general peace. This limitation of the activities of the world federation was all the more easy in that the most urgent needs of international administration were satisfied by the international administrative unions previously entered into, and could be still further satisfied in this way. In consequence the Second Hague Conference gave all the more attention to the development of the judicial organization. Unfortunately, a large part of this work proved fruitless. That is due first of all to the efforts made to have arbitration declared obligatory. Once we come to realize that the work of The Hague involves a political organization of the world with the object of securing international peace, we shall gradually seek to reach a situation in which the parties will be left free to decide whether or not they desire to make use of the judicial organization for securing peace. Even within state lines the time once was when private redress and legal procedure were optional, until finally private redress was forbidden and legal procedure made obligatory. It was desired at the Second Hague Conference to make at least a beginning in this direction, by making arbitration obligatory for certain disputes of less importance. Consistently with the whole development of international law, which in this matter,

as in the case of international administration, urges the states to collective organization, circumstances here naturally required a world treaty, and the system of individual treaties, for which the German delegation showed strange enthusiasm, could not possibly serve to develop properly the international judicial organization created by the world federation. Nevertheless, obligatory arbitration was unfortunately wrecked by reason of the German opposition.[1] The jurisdiction of the Permanent Court of Arbitration continued, therefore, to remain in principle optional.

[1] For reference, see the treatise by Zorn, *Das Deutsche Reich und die internationale Schiedsgerichtsbarkeit*, Berlin and Leipzig, 1911. The attitude of the German Empire is almost unanimously condemned by German jurists ; see in addition to Zorn's work my *Organisation der Welt*, p. 72 et seq., and von Liszt, *Das Wesen des völkerrechtlichen Staatenverbandes und der internationale Prisenhof* ; likewise Wehberg in the introduction to his edition of the Acts of the Hague Conference, p. 30. It is of great significance that Lammasch, who is recognized as the first authority of German science in the matter of arbitration, favoured the obligatory jurisdiction of the Hague tribunal, and ' so far as was consistent with the instructions given him sought to give his support to those endeavours ' ; see the carefully reasoned article on ' International Arbitration ' contributed by Lammasch to the *Staatslexikon*, published by Görres-Gesellschaft, 3rd ed., vol. ii, the best which has been written in the German language upon these matters. Nippold also, who has studied so carefully the development of procedure in international disputes, in his ' Critical Review ' of the Second Hague Conference (vol. i of his work upon that subject, p. 190 et seq.), definitely condemns the attitude of German diplomacy. Against Lammasch, Zorn, von Liszt, Nippold, Wehberg, and Schücking, there stands on the other side only Stengel, who in his book, *Weltstaat und Friedensproblem*, p. 63, speaks very disdainfully of a ' phantastic plan of a world arbitration treaty '. Moreover, in this connexion it must once more be stated that the German press and the German White Book presented all the reasons which the German delegate, Baron Marschall, advanced against the project of obligatory arbitration, but that it was prudently concealed from readers that these arguments of a juristic nature were completely refuted before the Congress on all important points in the detailed report of the Belgian, Guillaume, without causing the German delegate to alter his attitude.

The Second Hague Conference was, moreover, unable to remove the second defect of the international judicial organization pointed out above, namely, the constitution of the arbitral tribunal for each individual case by the parties themselves. This system has the great disadvantage that the contending states, as well as third parties, are not made conscious of the fact that the arbitration tribunal, in spite of the fact that it receives its jurisdiction from the voluntary act of the parties and is composed by them, decides in the name of the community of states, and that the arbitration tribunal merely acts as a judicial division of a permanent court of arbitration which is truly in existence, although not actually visible, and which is an organ of the community of states, and that accordingly the entire body of the civilized states stands behind its decision. We have, indeed, pointed out above that thus far no international law jurist has understood this clearly.[1] The proposed creation of a truly permanent court of justice at the Second Hague Conference (*Cour de justice arbitrale*) would therefore have greatly improved the organization, and the science of international law has, in my opinion, every reason to be grateful to the American delegates, in

[1] When Scott says that ' the present Court of Arbitration has its strong and its weak points ; its strong point consists in the idea which it embodies, its weak point is the instrument which it places at the service of this idea ', this antithesis between the idea and the instrument of its fulfilment is quite correct ; but we must add that the instrument is so defective that the idea itself is obscured. For the discussions upon the new judicial organ, see the *Proceedings of the Second Hague Conference*, vol. ii, pp. 593–708 (*Comité d'examen*), pp. 144 et seq., 177 et seq., 301 et seq. (*Commission*), the American draft, p. 1031, the British-German-United States project, pp. 1035 et seq., 1049 et seq. A briefer exposition of the proceedings is to be found in Fried, *Die zweite Haager Konferenz*, p. 98 et seq., and a more detailed exposition in Nippold, *Die zweite Haager Friedenskonferenz*, vol. i, 1908, p. 93 et seq.

particular Choate and Scott, for the energy with which they advanced this project; above all, we must add the practical consideration that the procedure of a truly permanent court of this kind would unquestionably be quicker than when the court must first be composed from a list of judges scattered all over the world. Such a truly permanent arbitration court would be more easily accessible to the parties, and would involve less expense, and for that reason it would be more frequently resorted to and its judicial decisions would possess continuity, since it would be composed of the same persons once for all, and by reason of this external continuity it would have a far greater significance for the development of international law;[1] above all else, it would be much more independent of the foreign offices, because its judges would not have been commissioned by the foreign offices to decide the given case. The sole objection which can be raised against this project, namely, that the Permanent Court of Arbitration of 1899 has proved itself relatively efficient, and that it would imperil the success of arbitration if the principle of the free choice of judges were to be set aside, is fully disposed of by the fact that the United States' proposal from the very beginning desired to have the Permanent Court of 1899 continue to exist side by side

[1] The significance of the new judicial court as a law-making body would be all the greater in that, according to Article 2 of the proposed Convention, the judges were to consist only of persons fulfilling the conditions qualifying them in their respective countries to occupy high legal posts or who were jurists of recognized competence in matters of international law, a provision which it is well known does not hold good to the same extent for the Permanent Court of Arbitration. In the case of the Permanent Court, Article 44 of the new draft requires merely a known competency in questions of international law, which may also be possessed by practical diplomats, who, if jurists were required, could not lay claim to that office.

with the new judicial organ of the community of states.[1] The parties would have, therefore, the option of resorting to one or the other court. Hence it appears to us as a foregone conclusion that the British-German-United States draft for the Judicial Arbitration Court should have been finally adopted, and also that it received the approval of the German Empire, which had taken so decided a position at the First Hague Conference against a world court of that kind.[2] We can only, therefore, greatly regret that

[1] For this reason it seems to me that Zorn's opposition to the new judicial court is unintelligible (*Das Deutsche Reich und die Schiedsgerichtsbarkeit*, p. 44). Zorn is undoubtedly right when he says, 'Why be so ready to make a change merely because of the theoretical idea that a court of arbitration composed of a list of judges is not a truly permanent court? . . . It would be very imprudent to alter the tried institution of 1899 without imperative reasons, and such imperative reasons do not exist.' But in these remarks Zorn evidently overlooks the fact that the Permanent Court of Arbitration will in truth remain unaffected, as the British delegate, Sir Edward Fry, had already pointed out at the Conference itself in answer to similar objections of the Belgian Minister, Beernaert. A detailed statement of the proceedings of the Conference in connexion with the founding of the Judicial Arbitration Court is to be found in Nippold, *Die zweite Haager Friedenskonferenz*, vol. i, p. 93 et seq. Nippold considers the said project (op. cit., p. 14) as one of the least important parts of the work of the Conference; he doubts whether a healthy progress of international law can result from it (p. 118), speaks of a downward path which the states have thus entered upon (p. 222), calls the idea of a truly permanent judicial court in connexion with the Permanent Court of 1899 an absurdity which is likely to compromise the progress of international justice (p. 224), and finally his dislike for this institution goes so far that he pronounces the project as doomed. As was said above, we cannot share in this view, and can only explain it by the fact that Nippold has held fast to the idea of arbitration as such, and is unaware of the new lines along which international law has actually been moving since the time that the First Hague Conference brought about a political federation of states by the judicial organization which it created.

[2] To be sure six states, namely, Belgium, Roumania, Switzerland, Denmark, Greece, and Uruguay, abstained from voting at the plenary

in spite of the adoption of the Draft Convention the project as a whole was wrecked by the difficulty of apportioning the judges among the states participating in the Conference.[1] It was necessary, therefore, to be content with recommending to the powers the adoption of the draft in the form of a *vœu* until such time as an agreement could be reached upon the selection of judges and the composition of the court. Thus far that has not been possible. Nevertheless the work done at the Second Hague Conference upon the Judicial Arbitration Court has not been permanently lost.

We have only referred superficially to the Judicial Arbitration Court in connexion with our subject,[2] in order to show how near the Second Hague Conference came to endowing the international judicial organization with a very valuable organ. The details of this project are not of importance here, but the fact is well worth mentioning that the union of states which maintains the Permanent Court of Arbitration at The Hague was regarded as the supporter of the new institution in whose name it would perform its functions, and that as the object of the union of states is to secure international peace, it must be considered as a world federation. Let us look once more at the draft in question. It is true that the rules for the

session on October 16, 1907. In how far the assertion made by Zorn that the votes of the majority were due less to the idea itself than to consideration for the United States from whom the proposal emanated, is founded in fact, I am naturally unable to determine.

[1] According to the American proposal there were to be fifteen judges on the court; but when the draft was presented to the Conference in plenary session for signature the provision respecting the number of judges was eliminated.

[2] The full text of the Convention may be found in Wehberg, *Textausgabe der Akte der Haager Friedenskonferenz*, p. 191 et seq.

Judicial Arbitration Court are not laid down in the Convention for the pacific settlement of international disputes, but are drawn up in a separate convention, so that this Convention can be denounced by itself,[1] and only those states need contribute to the general costs of the Judicial Arbitration Court which have taken part in the Convention establishing this court ; [2] nevertheless, the Conference had in view no new independent union of states for which the new judicial institution would perform its functions. The Permanent Court of Arbitration and the Judicial Arbitration Court are rather brought together in an organic connexion by the fact that the latter institution, which also has its seat at The Hague, is placed under the supervision of the Administrative Council of the Permanent Court,[3] before which the judges must take an international oath,[4] and by the fact that the International Bureau is equally put at the service of the new Judicial Arbitration Court as it is at the service of the Permanent Court.[5] The Conference intended, therefore, to transfer the new judicial institution to the international union created in 1899 at The Hague for the object of maintaining international peace, without considering whether all the members of the international union had taken part in the creation of this new institution. We perceive therefrom the importance of the union, and are forced once more to wonder why jurisprudence has entirely failed to occupy itself with it. The fact in itself that a political union maintains institutions which are not common to all the members of this union, but which nevertheless have the character of institutions of the union, is quite familiar to us

[1] See Article 35 of the Convention.
[2] Article 31.
[3] Article 12.
[4] Article 5, paragraph 2.
[5] Article 13 ; see also Article 9, paragraph 3.

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in public law. In the exceedingly close federal organization of the German Empire we possess institutions of that kind, as for example, the Postal and Telegraph Offices. The distinction is merely that in this case we are dealing with the so-called voluntary institutions for which the states not taking part in them must pay a proportionate sum to the imperial treasury, whereas, on the other hand, the states not taking part in the Judicial Arbitration Court were spared the assessments for this institution.

Before we leave the Judicial Arbitration Court we must finally call attention to one more point. Undoubtedly this court, if created, would be a further proof of the fact that in international law we have got beyond the anarchical state of the international community.[1] Nevertheless, this judicial court, if it were established, would not affect the present international system of the sovereignty of states within the international community. The view which was repeatedly advanced in the debates upon the new judicial court, that a truly permanent judicial court, in which the contending parties would no longer have the right to choose freely their own judges, was inconsistent with the sovereignty of states,[2] is clearly a mistaken one. So long as the existence and the composition of the said judicial court are dependent upon a treaty which may be denounced by the contracting parties, their sovereignty remains fully secured, even though the parties to a given

[1] See von Liszt, *Das Wesen des völkerrechtlichen Staatenverbandes und der internationale Prisenhof*, pp. 9, 10.

[2] This idea was advanced in particular by the Belgian delegate, Beernaert, and the Brazilian delegate, Barbosa, who were joined by the Swiss delegate, Carlin; see the summary of the debates given in Nippold, op. cit., p. 93 et seq., who, moreover, on his own part strangely enough represents the view that the project menaced the sovereignty of states; ibid., p. 223.

dispute can no longer appoint their judges *ad hoc.* This statement must suffice us, and we can all the more readily dispense in this place with a closer examination of the problem whether and in how far the Judicial Arbitration Court possesses the characteristics of an arbitration court, and would be consistent with the sovereignty of the individual states, since the said judicial court has at the present day no prospect of being established, and, on the other hand, the same question will once more be presented to us when we turn our attention to the International Prize Court.

Here also let us consider first of all the facts.[1] In consequence of a proposal made simultaneously by Germany and Great Britain, the Second Hague Conference created a special international court, the Prize Court, for a limited field of law, namely, an important part of the law of maritime war. The Convention in question has indeed not yet been ratified.[2] But now that the London Naval Conference has by a comprehensive codification considered the most important problems of international public maritime law, and after its ratification shall have dispelled the objections against an international court of prize on

[1] See the Convention itself in Wehberg's edition of the texts of the Hague Conferences, p. 154 et seq.; the discussions of the Conference are given in the *Actes et documents*, vol. ii, p. 11 et seq., and pp. 783–856 et seq.; the official documents relating thereto, pp. 1071–95. Pohl gives us the most detailed exposition, *Deutsche Prisengerichtsbarkeit*, Tübingen, 1911. The book contains a careful review of the documents and of the literature on the subject, and is besides, both in its fundamental idea of the international problem and in details, typical of the discrepancy between the spirit of the Hague Conferences, which is the spirit of the civilized world outside Germany, and the spirit of German international jurisprudence of the old school. For further comment on Pohl's book, see p. 6 of the introduction to this volume.

[2] The Convention was signed by thirty-one states, although certain states made reservation of Article 15; see preface by Wehberg in his edition of the texts, p. 154.

the ground that the law on the subject was not sufficiently definite,[1] we may hope that the powers will logically follow up their signing of the said Convention by ratifying it. The International Prize Court would thereupon be established. It is highly significant that in the case of the International Prize Court, in contrast to the Permanent Court of 1899, the two important advances have now been made which it was sought in vain at the Second Hague Conference to make for other disputes between states—the obligatory jurisdiction of the court and its truly permanent character, which excludes the free choice of judges in concrete cases.[2] The substantive jurisdiction of this court is settled once for all. Whereas, in the case of the Permanent Court a special *compromis* is in principle necessary, and indeed also in cases where there is a separate convention in force between the contending parties under which arbitration is made obligatory upon them,[3] in the present instance those states which have signed and ratified the convention are without more ado subjected to the Prize Court. We have here accordingly a judicial institution for prize cases, which acts not only in the name of the International Union but also under commission from it. The Prize Court is once for all composed of

[1] The ratification of the Declaration of London has, to be sure, not yet taken place, for in Great Britain itself the House of Lords has recently refused its approval. But in accordance with the constitutional changes of the summer of 1911, which reduced the veto of the House of Lords to a merely suspensive one, this need only mean a delay in the ratification of the Declaration, which of course will further delay the ratification of the Prize Court Convention.

[2] This evidently explains how Zorn (*Das Deutsche Reich und die Prisengerichtsbarkeit*, p. 42) pronounced this International Prize Court as 'by far the most important part of international judicial settlement'.

[3] With the exception that in such cases the court itself can, under certain circumstances, settle the *compromis*; see below.

fifteen judges and as many deputy judges, nine of whom are sufficient to constitute a quorum.[1] These judges are appointed for a period of six years and may be re-appointed. As regards the apportionment of judges among the forty-four powers represented at the Conference, the system was adopted by which all of the powers are to appoint judges for the Prize Court, but the judges are not all called upon to sit for the same period of time. Only the judges of the great powers, Germany, United States, Austria-Hungary, France, Great Britain, Italy, Japan, and Russia have the right to permanent representation upon the court. In the case of the other powers a system of rotation was adopted, in accordance with which their judges and deputy judges were to sit upon the court. This rota is based upon a list annexed to the Convention, in accordance with which the judges of some states are to sit three years and those of other states two years.[2] For the rest of the time of their tenure of office these judges may, by a comparison with the canon law, be termed *iudices in partibus.* However, under special circumstances they can be called upon to sit. If it should happen that a belligerent power has, according to the rota, no judge upon the court, it has the right to demand that the judge appointed by it to the court shall take part in all disputes originating in the war to which it is a party. Lots are to be cast to determine which of the other judges must be excluded from the court in order to make room for this new one.[3] This provision which secures to the belligerent power a seat and a vote upon

[1] See the second title of the Convention : 'The Constitution of the International Prize Court,' Articles 10–27, inclusive.

[2] Wehberg, op. cit., p. 178 et seq.

[3] Of course, the judge appointed by the other belligerent cannot be excluded ; see Article 16.

the Prize Court is the rudiment of the idea embodied in the Permanent Court of Arbitration that the parties shall only be judged by judges of their own choice.[1] Before taking their seat, the judges must take an oath making a solemn affirmation before the Administrative Council, as the representative of the international union, that they will discharge their duties impartially and conscientiously.[2] The Prize Court stands above the national courts, which cannot deal with a case in more than two instances and which must give final judgment within two years from the date of the capture.[3] It can, therefore, declare null a capture pronounced legal by the national court, and can order restitution of the ship and cargo together with the amount of the damages. If the vessel or cargo has been sold or destroyed, the court shall determine the compensation to be given to the owner on this account.[4] The appeal

[1] This idea is also held by von Liszt, *Das Wesen des völkerrechtlichen Staatenverbandes und der internationale Prisenhof*, 1910, p. 12.

[2] Article 13, paragraph 2.

[3] Otherwise the case may be carried direct to the Prize Court; see Article 6, paragraph 2. Moreover, according to Article 3 the judgments of national prize courts may be made the subject of an appeal to the International Prize Court:

1. When the judgment of the national prize courts affects the property of a neutral power or individual;
2. When the judgment affects enemy property and relates to:

(*a*) Cargo on board a neutral ship;

(*b*) An enemy ship captured in the territorial waters of a neutral power, when that power has not made the capture the subject of a diplomatic claim;

(*c*) A claim based upon the allegation that the seizure has been effected in violation, either of the provisions of a convention in force between the belligerent powers, or of an enactment issued by the belligerent captor.

[4] Article 8, paragraph 2. In accordance with paragraph 3 of the same article the Prize Court can only be asked to decide as to the damages, in case the national prize court has pronounced the capture to be null.

against the judgments of the national courts can be based on the ground that the judgment was wrong either in fact or in law.[1] The Prize Court has, accordingly, to examine the judgment upon questions of fact, and if the circumstances require it, to supplement the evidence upon such questions of fact, and in doing so it may itself call witnesses and experts, and require the production of documents, &c., provided, of course, this can be done without resort to compulsion or intimidation.[2] The Prize Court is, moreover, expressly authorized to disregard failure to comply with the procedure laid down in the enactment of the belligerent captor, when it is of the opinion that the consequences of complying therewith are unjust and inequitable ; it decides, therefore, upon the justice of the national law.[3] In rendering its decisions the court shall in the first place be governed by any treaty in force between the belligerent captor and the plaintiff, and in the absence of such provisions, the court shall apply the rules of international law, and if no generally recognized rule exists, the court shall give judgment in accordance with the general principles of justice and equity ; it has, therefore, evidently the power to fill up possible gaps in the law.[4] Finally, under certain circumstances an injured individual, whether he be a neutral citizen or a subject of the other belligerent, may in person bring an appeal against the belligerent captor, without the enemy state having the power to prohibit such appeal.[5]

[1] See the last paragraph of Article 3.

[2] Article 36 ; see also Article 27.

[3] Article 7, paragraph 5. Concerning the scope of this provision, see below.

[4] Article 7, paragraph 2.

[5] Article 4 reads as follows :

An appeal may be brought :

1. By a neutral power, if the judgment of the national tribunals

In the preceding pages we have mentioned only those provisions concerning the International Prize Court which characterize its position as a judicial institution within the international community. In this connexion some questions relating to organization may be briefly mentioned. As in the case of the Judicial Arbitration Court no new union of states was founded to maintain the International Prize Court. The significance of the international union which was founded in 1899 with the object of maintaining peace between nations, and which has thus far been so greatly neglected by science, can again be recognized in the fact that the new judicial organ created for the international community in the form of an International Prize Court from the very start is made part of the union founded

injuriously affects its property or the property of its nationals (Article 3, paragraph 1 ; see above, p. 103, note 3) ; or if the capture of an enemy vessel is alleged to have taken place in the territorial waters of that power (Article 3, paragraph 2, *b*) ;

2. By a neutral individual, if the judgment of the national court injuriously affects his property (Article 3, paragraph 1), subject, however, to the reservation that the power to which he belongs may forbid him to bring the case before the court, or may itself undertake the proceedings in his place ;

3. By an individual subject or citizen of an enemy power, if the judgment of the national court injuriously affects his property in the cases referred to in Article 3, paragraph 2, except that mentioned in paragraph *b* (see above).

Article 5 is of importance in determining the question who may bring an appeal, and applies particularly to insurance companies. It reads :

An appeal may also be brought on the same conditions as in the preceding article, by persons belonging either to neutral states or to the enemy, deriving their rights from and entitled to represent an individual qualified to appeal, and who have taken part in the proceedings before the national court. Persons so entitled may appeal separately to the extent of their interest. The same rule applies in the case of persons belonging either to neutral states or to the enemy who derive their rights from and are entitled to represent a neutral power whose property was the subject of the decision.

in 1899. It is true that, instead of simply including the rules relating to the Prize Court in the Arbitration Convention, a separate convention was concluded with regard to the International Prize Court, just as in the case of the Judicial Arbitration Court; moreover, the group of states adopting the new judicial organ does not fully coincide with the group of states which created the Permanent Court of 1899, the Convention relative to the Prize Court being only applicable in case the belligerent powers are parties to this special Convention.[1] The Convention is concluded first of all for a period of twelve years, and each of the participating powers has the right to withdraw from it by denouncing it at least one year before its expiration.[2] Nevertheless, as has been said, the states which have established for themselves the Prize Court have not established for themselves fundamentally a new and independent juristic union, but the Prize Court has been brought into connexion with the international union organized in 1899 in that this union appears as the essential juristic support of the new organ.[3] For the new Prize Court, which likewise has its seat at The Hague, is placed under the Administrative Council which was created by the international union of 1899 to superintend the activities of the Permanent Court of Arbitration. This organ of the world federation

[1] Article 51 of the Convention. In cases where the appeal is brought by a neutral state or by one of its citizens, the neutral state must naturally be a party to the Convention. In the case mentioned under Article 5 (see above, p. 104, note 5), the owner or the person holding rights from him must in like manner be a citizen of a state which is a party to the Convention.

[2] For the detailed provisions, see Article 55.

[3] The question in whose name the Prize Court is really to act, whether in the name of the general international union of 1899, or in that of a separate and newly-founded union, is entirely overlooked by Pohl, p. 150 et seq.

must be notified of the appointment of judges and deputy judges,[1] and it is before this Council that the judges before taking their seat must make their international oath ;[2] finally, this Administrative Council fulfils the same functions with regard to the International Prize Court as with regard to the Permanent Court of Arbitration.[3] If, in assigning this last duty to the Administrative Council, Article 22 of the Prize Court Convention contains the further clause that ' only representatives of contracting powers shall be members of it ', this does not mean that a special administrative council is to be constituted for the Prize Court. It only means that with respect to these functions of the Administrative Council which the world federation has constituted for its Permanent Court of Arbitration, the commission of those members who do not represent states participating in the new institution shall be inoperative. This provision, which it is important to observe was not included in the provisions for the Judicial Arbitration Court, corresponds entirely to Article 7, paragraph 4, of the German Imperial Constitution, which reads as follows :

> In deciding upon an affair which, in accordance with the provisions of this Constitution, is not the common concern of the whole Empire, only the votes of those federal states shall be counted which have a common concern in the affair.

[1] Article 11. The notification is sent to the entire Administrative Council of the Permanent Court, and even to the representatives of those states which are not parties to the Prize Court Convention.

[2] Article 13, paragraph 2. In like manner it is not said that when the Administrative Council performs this function of receiving the international oath only the representatives of those states shall co-operate which are parties to the Prize Court Convention.

[3] Article 22.

The affairs of the Prize Court are accordingly fundamentally the affairs of the world federation, but in so far as regards the functions of the Administrative Council referred to in Article 22, only the representatives of contracting powers shall participate in its deliberations. The fact that the entire body of states at the Conference regarded the Prize Court as an institution of their international union is evident from Article 57 of the Convention. Here it is said that two years before the expiration of the twelve-year period (or the six-year period in case of implied renewal) any contracting power may demand a modification of the provision of Article 15 and of the annexed table relative to the participation of the state in the composition of the Court. The demand shall be addressed to the Administrative Council, which shall examine it and submit to all the powers proposals as to the measures to be adopted. The powers shall inform the Administrative Council of their decision with the least possible delay. The result shall be at once, or at least one year and thirty days before the expiration of the said period of two years, communicated to the power which made the demand. When agreed to, the modifications adopted by the powers shall come into force from the commencement of the new period. These provisions make it perfectly clear that the powers taking part in the Conference reserved to themselves the decisions concerning any changes in the apportionment of the judges of the Prize Court, because they regarded the Prize Court as their organ. Only the less important question of changes in the rules of procedure was left to be regulated expressly by the contracting powers, to whom the Prize Court itself may, through the medium of the Netherland Government, make similar proposals;[1] the

[1] Article 50.

composition of the court is to be decided by the powers as a body, that is, by the entire world federation, and resolutions to that effect are, as we have heard, to be prepared by the entire Administrative Council of 1899. If the Prize Court were merely the organ of a separate international union of the powers participating in this Convention, it is self-evident that changes in the composition of this court would be left to this separate international union. The organic connexion of the Prize Court with the international union of 1899, which we have characterized as a world federation, is also evident from the fact that the International Bureau of the Permanent Court is to act as a registry to the International Prize Court as well as to the Judicial Court of Arbitration, and must place its offices and staff at the disposal of the court and has the custody of its archives and carries out its administrative work. The secretary-general of the International Bureau performs for the Prize Court as well the functions of a registrar.[1] The international union of 1899, in placing its registry at the disposal of the Prize Court, shares directly in the expenses of this special jurisdiction; it is only the general expenses of the Prize Court itself, that is, the expenses of its own administration, the honoraria to be paid to the judges and deputy judges, and the compensation and salaries for its special secretaries, stenographers, translators,[2] which are to be borne by the smaller group of the contracting powers.[3] The efforts made to bring the various judicial organs of the world federation into as close as possible connexion with one another are

[1] Article 23. It is only the secretary assigned to the registrar, as well as the necessary translators and stenographers, who are appointed and sworn in by the Prize Court itself; see paragraph 3.

[2] See preceding note.

[3] Article 47.

finally evident from Article 16 of the Draft Convention relative to the creation of the Judicial Arbitration Court. This article reads as follows :

> The judges and deputy judges of the Judicial Arbitration Court can also be appointed judges and deputy judges in the International Prize Court.

Thus these three international courts are not only brought within a common circle by the fact that they are all organs of one and the same international union, but in this instance there is also a sort of personal union created between the judges of the various courts.

Thus we have learned to recognize in the International Prize Court a new organ for the international union, which more than any other signifies the progress which the ' organization of the world ' has made within recent years. Max Huber, the technical delegate of Switzerland to the Second Hague Conference, has rightly said that the Prize Court Convention excels all the other conventions concluded at the Conference and was in itself sufficient to make the year 1907 one of the most important in the history of international law ; and he rightly calls this Convention ' a landmark of the first order in the history of international law '.[1] The hope which was expressed above that the Convention might not merely remain on paper, but might be translated into fact, has since the close of the Second Hague Conference been greatly increased by the fact that the London Naval Conference made an arrangement for removing an obstacle which might perhaps have prevented the ratification of the Convention. In accordance with a proposal from the United States the

[1] See Huber in the *Jahrb. des öffentlichen Rechtes*, vol. ii, 1908, p. 472.

delegates of the London Naval Conference unanimously adopted the following *vœu* :

> The delegates of the powers represented at the Naval Conference which have signed or expressed the intention of signing the Convention of The Hague of October 18, 1907, for the establishment of an International Prize Court, having regard to the difficulties of a constitutional nature which, in some states, stand in the way of the ratification of that Convention in its present form, agree to call the attention of their respective governments to the advantage of concluding an arrangement under which such states would have the power, at the time of depositing their ratifications, to add thereto a reservation to the effect that resort to the International Prize Court in respect of decisions of their national tribunals shall take the form of a direct claim for compensation, provided always that the effect of this reservation shall not be such as to impair the rights secured under the said Convention either to individuals or to their governments, and that the terms of the reservation shall form the subject of a subsequent understanding between the powers signatory of that Convention.[1]

Meanwhile, the agreement here under consideration by the powers represented at the London Naval Conference appears, in consequence of a circular note of the United States,[2] to be already realized, for at the end of September a report was current in the press that the Dutch parliament had adopted an annex to the Prize Court Convention which evidently had reference to the above *vœu*. Apparently the states as a body, and not merely those represented

[1] The text of the *vœu* is given in the Imperial German White Book upon the London Naval Conference of March 20, 1909, pp. 7 and 8.

[2] The note in question was written by the Secretary of State of the United States under date of October 18, 1909, and is printed in the *American Journal of International Law*, Supplement, vol. iv, p. 102 et seq.

at the London Naval Conference,[1] will ratify the Prize Court Convention with a corresponding reservation, in order to avoid an unjustifiable inequality of treatment before the Prize Court.[2] The value of the Prize Court is not in any way altered by this agreement.[3]

On the other hand there is the possibility that the Prize Court may extend its influence far beyond the field of that special jurisdiction in prize matters contemplated by the Convention adopted at the Second Hague Conference. For the United States of America has made the proposal that the Prize Court shall act as a general and truly permanent international arbitration court in place of the Judicial Arbitration Court, over the composition of which

[1] Only Germany, the United States, Austria-Hungary, France, Spain, Italy, Japan, Holland, and Russia, took part in the Conference.

[2] So Pohl rightly holds, op. cit., p. 163.

[3] On this point I am fully in agreement with Pohl (ibid.). If the London delegates took the opposite position under the idea that, in accordance with the original draft of the Prize Court Convention, the decisions of national prize courts could be formally approved and annulled, they mistook the meaning of Article 8 of the Convention. This danger, which the United States thought it must obviate in anticipation of a conflict with its Constitution, cannot arise from Article 8 ; see below. The only practical difference between the state of things in case the additional convention is adopted would be the following. Before its adoption, if the highest national court had declared the capture legal, the ship and cargo could be sold in spite of the appeal taken to the Prize Court ; in that case, the decision of the International Court simply determines the compensation to be paid. But if the ship and cargo have not been sold before the decision of the Prize Court, the decision calls for the restitution of ship and cargo, together with the amount of damages, if any have been occasioned by the detention of the ship and cargo. If, after the adoption of the additional convention, the appeal to the Prize Court is merely taken to obtain damages, the condemned state can sell the ship and cargo, title to which has been confirmed by its national courts, even after the Prize Court has passed a judgment against it. For it is no longer condemned to restitution, but merely to payment of compensation.

it has thus far been impossible to reach an agreement.[1] From the position which Germany has taken towards the new organ it is to be assumed that the Judicial Arbitration Court will likewise be accepted in this form, and we may perhaps hope that the other states will approve. Even if the Prize Court holds only the more modest position of a special court, we must oppose von Liszt's statement that by the creation of this court the structure of the international union has been fundamentally altered and the international community has taken on an entirely different

[1] See the 'Identic circular note of the Secretary of State, P. C. Knox, of October 18, 1909, of the United States proposing alternative procedure for the International Prize Court and the investment of the International Prize Court with the functions of a Court of Arbitral Justice,'* mentioned above, p. 111, note 2. In this note it is said that

> The United States therefore propose that in the instrument of ratification of the International Prize Court Convention, signed at The Hague, October 18, 1907, any of its signatories consenting to invest the International Prize Court with the powers of a Court of Arbitral Justice shall signify its assent thereto in the following form :
>
> Whereas ; It is highly desirable, that the Court of Arbitral Justice approved and recommended by the Second Hague Peace Conference, be established through diplomatic channels ; and
>
> Whereas ; Investing the International Prize Court with the duties and functions of the proposed Court of Arbitral Justice would constitute for the consenting powers the said Court of Arbitral Justice, as recommended by the first *vœu* of the final act of the said conference ;
>
> Therefore, the Government of . . . agrees that the International Court of Prize, established by the Convention signed at The Hague, October 18, 1907, and the judges thereof, shall be competent to entertain and decide any case of arbitration presented to it by a signatory of the International Court of Prize, and that when sitting as a Court of Arbitral Justice the said International Court of Prize shall conduct its proceedings in accordance with the Convention for the establishment of a Court of Arbitral Justice, approved and recommended by the Second Hague Peace Conference on October 18, 1907. [Printed in the *American Journal of International Law*, Supplement, vol. iv, p. 102 et seq.]

* Translator's Note.—While in the official translation of the Hague Conventions adopted by the State Department the *Cour de justice arbitral* is rendered 'Judicial Arbitration Court,' the more literal rendering 'Court of Arbitral Justice' is also frequently used.

character. Before we undertake to examine this statement, let us direct our attention to still another institution of the Hague Conferences.

Consistently with its past neglect of the theory of the international union created by the Hague Conferences, science has, so far as I can see, not concerned itself at all with the question as to what is the essential position which the 'international commissions of inquiry', created by the First Hague Conference and developed by the Second Hague Conference, hold with regard to the whole system.[1]

It was a mistake to consider them as something absolutely new. If we look into matters closely we shall recognize that they have their precursors in the international commissions of inquiry composed of representatives from different states (*commissions internationales mixtes*).[2] These commissions were well known to international law as a valuable means for the pacific settlement of international disputes and were frequently made use of. They often served indeed not only to clear up the technical aspects of important international facts, but while deter-

[1] See in this connexion the work of my pupil, G. Herr, *Die Untersuchungskommission der Haager Friedenskonferenzen, ihre Vorläufer, ihre Organisation und ihre Bedeutung für die friedliche Erledigung internationaler Streitigkeiten*, pt. 15 of the publications of the Seminary of Legal and Political Science at the University of Marburg, 1911.

[2] This has already been pointed out by the Belgian, Descamps: 'The honourable delegate from Roumania [Beldiman] has said that these commissions are an innovation. I must make an explanation. Mixed commissions have existed and acted for a long time. We are seeking to improve them by introducing a neutral element. Nevertheless, the former mixed commissions and the new commissions are organs of the same species.' See the *Proceedings* of the First Hague Conference, pt. 4, p. 54; see also the study by Herr upon the position of commissions of inquiry in the system of international institutions and their precursors, op. cit., pp. 22–33; in the same work may be found the older literature upon this institution.

mining the facts they have pointed out the ways and means to remove international difficulties, and have frequently been called upon to decide directly upon international disputes. To that extent there is an historical connexion between this institution and international arbitration. Now it might appear at first sight that in consequence of the precise limitation of their functions by the First Hague Conference (namely, the elucidation of facts), the connexion between the 'international commissions of inquiry' and arbitration was completely broken; and in consequence of the meagre provisions which the Convention adopted at The Hague in 1899 contains with regard to that alleged new institution,[1] it might appear as if, whereas the Permanent Court of Arbitration was to exercise henceforth its jurisdiction in the name of the international union of the Hague Conferences, the international commissions of inquiry were to act merely for those states which agreed to constitute them for a given dispute. Meanwhile, the manner in which the Second Hague Conference has developed this institution[2] leaves no doubt that we must regard these commissions as organs of the international union, which are to be distinguished from the Permanent Court of Arbitration, with which they share the character of being optional, only by the fact that whereas the Court of Arbitration is a permanent organ of the international union, international commissions of inquiry are an exceptional organ of the community of states, like the dictator in the Roman Republic. The Second Hague Conference clearly re-established the old historical connexion between commissions of inquiry and arbitral courts, without extending the duties of the com-

[1] Articles 9–14 inclusive of the original Arbitration Convention.

[2] See Articles 9–36 of the new Convention.

missions of inquiry. In this connexion it is first of all important to state that henceforth these organs, in the absence of a contrary agreement between the parties, are also to have their seat at The Hague where the international union is domiciled.[1] Likewise, in default of agreement to the contrary, the commissions of inquiry shall in the future be constituted from among the judges of the Permanent Court, precisely as in the case of arbitral procedure.[2] Here we have, in addition to the bond created by location, a personal bond between the commissions of inquiry and the judicial organization of The Hague. Further, it is expressly provided that the International Bureau of the Permanent Court of Arbitration shall act as a registry for the commissions of inquiry which sit at The Hague, and shall place its offices and staff at their disposal.[3] Even if the commission by an exception should have its seat elsewhere than at The Hague, and for that reason should need a bureau of its own, the archives of the commission are subsequently to be transferred to the International Bureau at The Hague.[4] Third states are obligated to execute, so far as the means which they possess under municipal law allow, requests of the commission with respect to the service of notices in the territory of the said powers, and they can only refuse such requests when they are calculated to impair their sovereign rights or safety.[5]

If we consider these provisions as a whole we shall see that the internal connexion which now exists between the international commissions of inquiry and the Arbitration Court has brought it about that those commissions are to be regarded, like the Permanent Court of Arbitration, as an institution which is to act in the name of the Hague inter-

[1] Article 11. [2] Article 12. [3] Article 15.
[4] Article 16, paragraph 2. [5] Article 24.

national union, although it is left to the free choice of the parties to constitute them, just as is the case in the composition of the individual arbitration tribunal,[1] with the difference, however, as has been said, that in contrast to the Permanent Court they have not the character of a permanent, but merely of an exceptional, organ of the international union.

Accordingly we see before our mind's eye the two, or rather three, permanent organs of the international judicial community, the Permanent Court of Arbitration, the Judicial Arbitration Court (for the present to be sure an incomplete project), and the Prize Court, which have grown up within the international union, and with them are associated, as exceptional and occasional organs, the international commissions of inquiry with their related task of elucidating disputed facts. All of these organs have at their service one and the same 'International Bureau', which is, on its part, under the superintendence of the 'International Administrative Council'. And yet this international union of the Hague Conferences has been thus far neglected by the text-books of international law!

[1] For that reason the commissioners are granted diplomatic privileges and immunities to the same extent as is provided in Article 46, paragraph 4, for the judges of the Hague arbitration tribunal. And indeed, in my opinion, that holds not merely for the case where, in the absence of a special agreement, the commissioners are selected from the list of the Permanent Court of Arbitration at The Hague. Wehberg also comes to this conclusion in his commentary on the Arbitration Convention, op. cit., 28, where he justly observes: 'The commissioners are indeed under certain circumstances international judges, if only upon questions of fact. They have, for example, to test the trustworthiness of witnesses, if they wish to present an impartial report. Their duties with respect to international justice are accordingly of a high character, and for that reason diplomatic privileges and immunities are granted them. Moreover, it is also desirable that in the future the report of the international commission should state the fact that in conducting its inquiry it acted in the name of the international union, although under commission from the parties.'

Section 2. The Alleged Change in the Structure of the International Union

Hitherto in the history of states a federation has always acted as a transition towards a closer political union. One need only offer as instances the United Netherlands, the States of America under the Articles of Confederation, the Swiss Confederation, and the North German Confederation. Is the world federation in consequence actually on the point of being converted into a world federal state ? I have pointed out in an earlier work,[1] that I consider such a development as fundamentally possible ; but it is one thing to discuss the theoretical possibilities of a political nature which perhaps may become realities in the course of centuries, and in so doing to state a belief rather than a fact, and another thing to define the legal situation of the present time. With respect to the latter point von Liszt has asserted that since the Second Hague Conference the international union must be regarded not merely as a community but as a commonwealth, as a corporate union.[2] Does von Liszt mean to say that in consequence of the events of the Second Hague Conference the transition from a mere federation to a federal state has been already completed ? He has been careful not to make such an assertion. For even if his view were correct that, as a result of the jurisdiction exercised by the Prize Court in the form of a supra-national world court, a sovereign authority will be exercised by a supreme commonwealth, and that the creation of the International Prize Court with its jurisdiction independent of the consent of the parties constitutes an encroachment upon the sovereignty of states,

[1] *Die Organisation der Welt*, p. 80.

[2] Von Liszt, *Das Wesen des völkerrechtlichen Staatenverbandes*, p. 24.

the tests of a federal state would be still far from being fulfilled. No matter what narrow limitations a federal state may impose upon itself in the exercise of its central power, no matter how completely it may turn over matters of government to the member states, the federal state remains always itself a sovereign political entity, which on that account must be competent to extend its competency by an amendment to its constitution. It must, as Jellinek has expressed it,[1] 'possess in itself potentially all the rights of sovereignty, even those turned over to the member states for their independent exercise'. But there can be evidently no question of that here. The Convention of the Second Hague Conference 'relative to the establishment of an International Prize Court' is in no way the constitution of a political commonwealth, but is merely an international treaty precisely as is the Convention for the pacific settlement of international disputes concluded in 1899 and renewed in 1907. But when, for example, the demand is repeatedly expressed publicly that the Third Hague Conference must make the international judicial organization at The Hague competent also for cases in which a citizen of one state brings suit against a foreign state, because in this instance the domestic courts have no jurisdiction,[2] this important progress could evidently not be made by an amendment to the non-existent constitution of the international union, but a new contractual agreement must be concluded between the states. Accordingly it cannot be said that there has been established a new commonwealth in the form of a federal state which extends its competency by constitutional methods.

[1] Jellinek, *Die Lehre von den Staatenverbindungen*, p. 296.

[2] See the earlier-mentioned work of Wehberg, *Ein internationaler Gerichtshof für Privatklagen*, Berlin, 1911.

Von Liszt appears to have realized this, for he speaks of a sovereign union which diminishes the sovereignty of the individual states, but he gives no name to this sovereign union. Instead, he calls upon us to alter the old abandoned idea of sovereignty, if it is no longer suited to the subordination of states under a corporate union,[1] such as he assumes to exist. In my opinion we should proceed differently. First of all we must, as was observed above, as far as possible apply to new political institutions our existing scientific concepts. If, now, we must really admit with von Liszt that the establishment of the International Prize Court involves a diminution of the sovereignty of the individual states, there would be no reason on that account for altering the concept of sovereignty which has rendered such distinguished service to science thus far. We would rather be confronted with the task of finding some classification for the new sovereign international union with its own corporate personality. The category of federal state would, as we have already shown, not be applied to this commonwealth; nor would that of federation apply, since a federation, according to the prevailing theory, does not diminish the sovereignty of the federated states, and does not at all imply a legal authority placed over them, but merely a legal relationship between them. Accordingly, in order to justify the end of the international union, as von Liszt sees it, we must either revise our concept of federation, or rather federal state, or we must coin a new category for a political commonwealth of a kind which falls between a federation and a federal state. But that would be after all no misfortune. For science always hobbles along behind the facts and has often enough found it necessary to coin new legal concepts for new phenomena of social life.

[1] Von Liszt, op. cit., p. 24.

But before we actually apply ourselves to this task, we must first of all subject the theory of von Liszt of the corporate personality of the international union to a strict examination. But this examination will lead us to the conclusion that in reality a corporate union of the international community of states does not exist. To be sure, the Prize Court is organized in an essentially different way from the Permanent Court of Arbitration. The substantive jurisdiction of the court is, as we have seen, once for all settled. As in the case of the Permanent Court, the decisions of the Prize Court are rendered in the name of the international union; but, whereas in the former case the commission of the judges in each individual case must come from the parties themselves, the Prize Court decides under authority of those states which have conferred jurisdiction upon this organ for disputes in the field of prize law. This does not make the Prize Court the instrument of a higher supra-national legal authority to whose will the states have subjected themselves, and von Liszt is mistaken when he says that:

> As a matter of fact it cannot be denied that the establishment of a Permanent Court with a jurisdiction independent of the consent of the parties constitutes an encroachment upon the sovereignty of states and thereby alters the foundations of international law.[1]

In reality this wholly obligatory jurisdiction of the Prize Court rests merely upon the contractual consent of the states. This contract is indeed, as was shown above, expressly limited in point of time, and each of the contracting powers enjoys the right to denounce the Convention within fixed periods. But if the right of denunciation is

[1] Ibid., p. 13.

granted to the contracting powers *expressis verbis*,[1] where is there in reality any encroachment upon the sovereignty of states? In this thesis put forth by von Liszt there is in my opinion a reversion to that idea of the nature of sovereignty which, formerly held within national lines as a result of absolutism, prevented the possibility of a constitutional limitation of the sovereign, and still at the present day might perpetuate international anarchy and deny absolutely the possibility of international union.[2] But fortunately this idea has at the present day been at length set aside. We see in sovereignty to-day merely an unlimited commercial competency. This, however, is not taken away by international treaties, but is rather put into effect. When von Liszt, who of course shares this fundamental idea of the nature of sovereignty,[3] thinks that in the present case the idea of self-limitation on the part of a sovereign state should not be extended to cases where by an autonomous statute the will of one state is subordinated to the will of another,[4] we must assert that in international contracts there is certainly a subordination to a foreign will. When a state, for example, obligates itself to extradite certain criminals, it renounces the right in the individual case to decide as a sovereign state upon the demand for extradition, and it must rather follow the will of the foreign state. Such a subordination to a foreign will is rightly to be found first of all in cases where an international organization has been created and a central power established. A state which has entered into the

[1] See Article 55 of the Convention relative to the establishment of an International Prize Court.

[2] See Schücking, *Die Organisation der Welt*, p. 77; further the excellent remarks of Nippold, op. cit., p. 42 et seq.

[3] See von Liszt, *Völkerrecht*, 6th ed., p. 50.

[4] Von Liszt, *Das Wesen des völkerrechtlichen Staatenverbandes*, p. 22.

Universal Postal Union subordinates itself to the will of this union in many respects.[1] When von Liszt, in proof of his assertion that the subordination to a foreign will implies the surrender of sovereignty, brings the further example that it cannot be denied that the hitherto sovereign state loses something of its sovereignty when it confers upon another state the management of its foreign and the superintendence of its domestic affairs, he is evidently thinking of the status of semi-sovereignty, which to be sure carries with it for the state in question the loss of its real sovereignty. Meanwhile, von Liszt can point to no example of that kind in international law in which such a relationship between two states was limited by treaty to a fixed period, leaving to the semi-sovereign state the right to denounce its suzerain! As was said above, we can hardly imagine such a case as possible in the future. But if it should, nevertheless, actually happen at any time, it would simply be necessary to say that in consequence of the merely temporary subordination of the state to a foreign power it has retained its sovereignty *de iure* and merely abandoned it temporarily *quoad exercitium*. Accordingly it cannot be said that the Prize Court Convention has resulted in the limitation of the sovereignty of the contracting state,[2] and since the jurisdiction of the Prize

[1] Under certain circumstances the rules concerning communications between the members of the Union can even be altered with binding effect against the will of the said state; see Article 26, 3 of the Universal Postal Union Convention of June 15, 1897, in Fleischmann, *Völkerrechtsquellen*, No. 67, p. 286.

[2] The Japanese delegate, Tsudzuki, was therefore entirely wrong when he stated at the Second Hague Conference that the Convention was of a character to 'impose a serious limitation upon the sovereign rights of states' (second session of the First Commission on September 10, 1907, *Actes*, ii, p. 20). Here appears again the old idea of sovereignty which opposed every legal obligation upon the will of the state. Fried

Court does not rest upon the will of a supra-national commonwealth but upon the contractual consent of the parties, we have in reality nothing else here than true arbitration. As no one doubts that the obligatory jurisdiction of the Hague Permanent Court of Arbitration, whether created by special conventions or by the world treaty unfortunately wrecked at the Second Hague Conference, does not conflict with the nature of strict arbitration, so also in the establishment of the Prize Court we have nothing more than obligatory arbitration of the strictest kind.[1] When von Liszt thinks that a clear line

(*Die Haager Konferenz*, 1900, p. 52) says of the First Hague Conference that many of the delegates at The Hague had not yet come into touch with the modern concept of sovereignty, and that they always saw an infringement of sovereignty in every treaty and in every concession to another state, which, he said, could not be conceded. The fact that the jurisdiction of the Prize Court involves merely a voluntary denunciable subordination to an organ created by the international union is rightly recognized by Hold von Ferneck in his article '*Eine Lanze für den Prisenhof*' in the *Ztschr. für Völkerrecht und Bundesstaatsrecht*, vol. vi.

[1] So Zorn rightly holds in contrast with his own earlier opinion in the *Ztschr. für Politik*, vol. ii, p. 354; likewise Pohl, p. 193 et seq.; Huber (*Jahrb. des öffentl. Rechts*, vol. ii, p. 472) is mistaken when he says: 'The International Prize Court is the first international court which is organized not upon the basis of arbitration, but upon that of national courts.' Nippold (*Die zweite Haager Friedenskonferenz*, vol. i, p. 185) also appears to see in the Prize Court not an arbitral court, but rather a regular judicial court. At least he cites an older expression of Zorn's in this sense. Quite recently Hold von Ferneck (op. cit.) mistakenly argues against the character of the Prize Court Convention as an arbitration convention and against the nature of the Prize Court as a world arbitration court for a special field. But he does so less upon theoretical grounds than in order to reject the *terrible* consequences which Pohl has drawn from his idea of the nature of the Prize Court and of the Convention relating to it—an idea which, in my opinion, is entirely correct. We shall return to this subject below and show that those inferences drawn by Pohl are entirely erroneous, and must be vigorously rejected even by those who share his fundamental idea of that institution.

can be drawn between obligatory arbitration and the jurisdiction of the Prize Court, in that a definite arbitration treaty is necessary in the first case, whereas the jurisdiction of the Prize Court is once for all settled, we must in answer first of all point out the fact that according to Article 53, paragraph 2, of the Convention for the pacific settlement of international disputes, the Permanent Court is, under certain circumstances, competent to settle the *compromis* at the request of one of the parties, in order that the execution of the Convention giving jurisdiction to the court may not be prevented by difficulties in the settlement of the *compromis*.[1] The conditions are that:

1. The general treaty of arbitration has been concluded or renewed after the Convention for the pacific settlement of international disputes, of October 18, 1907, has come into force;
2. The general treaty of arbitration does not either explicitly or implicitly exclude the settlement of the *compromis* from the competence of the court;
3. The parties are agreed that the dispute belongs to the cases of obligatory arbitration provided for in the general arbitration treaty, or the general arbitration treaty has conferred upon the arbitration tribunal the power of deciding this preliminary question;[2]

[1] See the interpretation of Article 53, paragraph 2, in Wehberg's *Kommentar*, p. 96 et seq.

[2] A well-known instance of disagreement upon the point whether a concrete dispute was included in the cases of obligatory arbitration provided for in the general arbitration treaty concluded between Germany and Great Britain arose over the intervention of the former Government in favour of claims for damages brought by German citizens as a result of the Boer War. Article 1 of the British-German arbitration treaty of July 12, 1904, as published in the *Reichsanzeiger* of July 15, 1904, no. 165, reads as follows:

> Differences which may arise of a legal nature, or relating to the interpretation of treaties existing between the two contracting parties, and which it may not have been possible to settle by diplomacy,

4. An understanding between the parties through diplomatic channels has been attempted in vain.

Granted these conditions, a special arbitration treaty is indeed concluded, in contrast with the procedure before the Prize Court, but it is concluded by the judicial court itself at the simple request of one of the parties. But even the Prize Court cannot act *ex officio*, that is, without an appeal from one of the parties. In both cases it is sufficient to give jurisdiction to the court that one of the two parties sets the machinery in motion. Whether, then, the judicial court as a Permanent Court of Arbitration first settles the *compromis* on its own initiative, or whether as a Prize Court it forthwith enters upon its functions in accordance with the general rules provided for its jurisdiction in the Prize Court Convention of the Second Hague Conference, is

shall be referred to the Permanent Court of Arbitration established at The Hague by the Convention of July 29, 1899, provided, nevertheless, that they do not affect the vital interests, the independence, or the honour of the two contracting states, and do not concern the interests of third parties.

The British objection that the dispute in question did not fall under this arbitration treaty, because Great Britain, it was said, could not recognize a right to damages in such cases, is a very sad violation of good faith in the application and interpretation of arbitration treaties. For there is evidently a dispute of a legal nature where *A* demands something of *B* as his right. The experience which we have had in this case teaches us, however, how necessary it is in a general arbitration treaty to provide a jurisdiction by which the preliminary question of competence shall be decided. For another case of disagreement as to whether a concrete dispute came under a general treaty of arbitration, see Wehberg's *Kommentar*, p. 98, no. 1. Moreover, Wehberg (op. cit., p. 100) rightly observes that when a state has once entered into negotiations regarding the settlement of the arbitration treaty, that is to be regarded as an admission that the dispute belongs to the cases to be submitted to arbitration in virtue of a general treaty of arbitration. The subsequent objection that the affair did not come under the arbitration treaty was, he says, a breach of law.

rather a question of procedure ; and it cannot be concluded that there is a difference in the nature of the jurisdiction in the sense that in the one case we are dealing with strict arbitration, and in the other case with regular judicial settlement. The absence of a fundamental distinction between the nature of the jurisdiction of the Permanent Court of Arbitration and that of the Prize Court is all the more evident if the parties in their obligatory arbitration treaty have disclaimed the necessity for a separate arbitration *compromis* for each individual dispute.[1] In that case also the Permanent Court of Arbitration would have jurisdiction at the appeal of one of the parties when it has been impossible to reach an agreement through diplomatic channels ; and the defendant state must claim that the affair affects its honour, if it is to escape from having the affair arbitrated without violation of good faith.[2] We see

[1] Article 51 of the Convention has left the parties complete liberty to conclude separate treaties providing for other rules of procedure before the Permanent Court of Arbitration. Accordingly it must be possible to conclude special agreements which make the special arbitration treaty or *compromis* unnecessary. Wehberg (op. cit., p. 94) says that in view of the difficulties so often attending the *compromis* it would be exceedingly desirable that the parties in their general arbitration treaty should declare a special *compromis* unnecessary, or at least lay down special provisions for cases where a *compromis* cannot be agreed upon ; and he refers to the arbitration treaties which Italy has concluded with Peru, Argentine, and Denmark, with the stipulation that in the absence of a *compromis* the arbitrators are to decide upon the basis of the propositions formulated by the parties.

[2] Under certain circumstances, that is to say, if the general arbitration treaty contains a provision to that effect, the defendant would naturally be able to set up the plea that there is no legal dispute present. An unjustified refusal to submit to arbitration would be an unlawful act ; though to be sure it would have the effect of withholding the case from the court in spite of its jurisdiction. On this point I am in agreement with Wehberg (op. cit., p. 94). For if the defendant refuses to enter into the written preliminary proceedings, the case cannot be brought before the court.

that the case of the so-called 'obligatory *compromis*' in the sense of Article 53, paragraph 2, no. 1, of the Convention for the pacific settlement of international disputes, and the case where it is stipulated by treaty that the special arbitration treaty or *compromis* shall not be necessary, constitute a significant transition from the cases of the jurisdiction of the Hague Permanent Court, which regularly presuppose a definite *compromis* for each individual dispute, to the jurisdiction of the Prize Court, which in principle does not require a definite *compromis*.[1] The line between the two institutions is more or less variable, and there is no essential difference between them. On the other hand we must not, indeed, overlook the fact that there are important differences between those cases of the so-called obligatory *compromis*, in which the Permanent Court of Arbitration is competent to settle the *compromis* at the unilateral request of one of the parties, and the jurisdiction of the International Prize Court. Prescinding from the fact that in the cases of the first category there is always a treaty between the parties, and in those of the second category, that is, those coming under the jurisdiction of the Prize Court, there is an international judicial system, the opposition between the two lies in the fact that in the case of the so-called obligatory *compromis* the parties can always evade the selection of the commission

[1] The situation referred to in Article 53, paragraph 2, no. 2, mentioned above, is in my opinion less significant as a transitional step. Here also we are dealing, to be sure, with the so-called obligatory *compromis*; but it is a fixed condition that both parties shall have expressly agreed that the affair is to be settled by arbitration. As the case requires that the one power shall claim contract debts as due to its citizens from another power, Wehberg (op. cit., p. 102) would rightly like to have the said rule included under the special convention 'respecting the limitation of the employment of force for the recovery of contract debts'.

whose duty it is to settle the so-called compulsory *compromis*, and then also to form the arbitration tribunal.[1] In such cases, although only by an illegal act, the activity of the court, which in itself is permanent, can always be checked; but it is otherwise in the case of the Prize Court, which is a permanent body of judges. But in this contrast, that in the one instance the judges must be appointed by the parties for the individual dispute, whereas in the other case they are appointed *in abstracto* by a treaty covering all disputes, we must not see a distinction in the character of the jurisdiction. In the latter case also the court is an arbitral one, because the judges are appointed to their office not by the will of a legal authority placed above the parties, but by the parties themselves. The fact that the functions of the International Prize Court are strictly arbitral in character will become clearer to us from an interesting parallel drawn from the procedure of municipal law. Here the parties can make an arbitration court competent for an individual case, when there must naturally be a definite *compromis*. But it is also possible that the parties may conclude an arbitration treaty of a general character relating to future disputes which may arise between them, if in so doing they refer to a fixed legal relationship between them, and to disputes arising from it.[2] Something similar has taken place in the Convention

[1] See Articles 54 and 58. The obligation of the obligatory *compromis* is accordingly only a relative one, on which point I agree with Wehberg (op. cit., p. 101), where the literature on the subject may be found. Even when there is question of a general arbitration treaty in which the special *compromis* is provided for in advance, and where definite names upon the list of judges are contemplated to constitute the court, the proceedings can always be brought to a stop by an illegal act of one of the parties. See p. 127, note 2.

[2] *Reichszivilprozessordnung*, sec. 1026.

relative to the establishment of an International Prize Court. A general arbitration treaty was concluded. The legal relationship to which this treaty was limited is that of war, or rather neutrality; and the disputes arising therefrom, which are embraced by the treaty, are only those relating to prize law. When lessor and lessee conclude a general arbitration treaty for all future disputes relating to the lease, the arbitration court for which they provide has jurisdiction in a concrete case, without the need of a further definite arbitral agreement; and no more does the jurisdiction of the Prize Court require one. No one has ever doubted that in those cases the procedure was strictly arbitral, even without a special arbitral agreement in each instance; and for that reason the jurisdiction of the Prize Court should not be regarded as an instrument of a regular judicial system. That the functions of the Prize Court are not those of a regular judicial court is evident from the fact that the Prize Court is not provided with the power of enforcing its decrees.[1] We regard the power of enforcement as an essential part of a judicial decision [2] and compare the decisions of mere arbitral courts between private persons to the decisions of foreign courts, in that, although their binding force is recognized in principle, yet in the absence of an authority on the part

[1] So Pohl (op. cit., p. 195) rightly observes in opposition to the opinion expressed by Zorn in the memorial to Laband, vol. i, pp. 179, 180. Zorn himself, however, later changed his opinion; see p. 124, note 1.

[2] Huber (*Die Gleichheit der Staaten*, memorial volume to Kohler, p. 110) is of the same opinion. Hold von Ferneck (op. cit.) is mistaken when he says in this connexion that 'the fact that it [the Prize Court] possesses in no case the power of enforcement cannot do prejudice to its character as a judicial court, because even municipal courts frequently lack such power of enforcement'. It is not clear to me what municipal courts he has in mind.

of the arbitrators or foreign court, the decisions are, in this respect, in need of being supplemented within our territory. The Prize Court has, however, just as little power of enforcing its decrees against a state which is a party to the Convention as has the domestic arbitral court of enforcing its decrees against the individuals affected by its award. Just as in accordance with sec. 1035 of the Code of Civil Procedure the arbitral court in Germany can only examine such witnesses and experts as voluntarily appear before it, so the International Prize Court may, as has been said above, only take supplementary evidence in so far as this can be done without resort to compulsion or intimidation,[1] and when it applies to the foreign state to have notices served or evidence procured, the latter can reject the request when it considers it calculated to impair its sovereign rights or its safety.[2] Accordingly we see clearly that the Prize Court is entirely lacking in the power of enforcement, which is an indispensable part of regular judicial institutions. Nevertheless the Prize Court possesses a jurisdiction higher than that of the national courts.[3] It secures at the

[1] Article 36 of the Convention. See also paragraph 2 of the same, which provides that if steps are to be taken by members of the court for the purpose of obtaining evidence outside the territory where the court is sitting, the consent of the foreign government must be obtained.

[2] Article 27 of the Convention.

[3] This view is also held by Hold von Ferneck in his oft-mentioned treatise, where he speaks as follows from his intimate knowledge of the facts : ' On the contrary all the delegates of the great powers and their governments have ever since the conclusion of the work of that Conference [of London] been of the conviction that the Prize Court is an international court of appeal.' But Hold von Ferneck is mistaken in his assumption that the character of the Prize Court as a court of appeal takes from it its arbitral character. That is simply not the fact. Rather, a court of appeal having the character of an arbitral court has been set up over the national courts. An appeal can be taken from the national courts to an international arbitration court, just as in Prussia, in contesting

appeal of one of the parties a new trial both on the facts and on the law. The possibility above mentioned, that in accordance with Article 7, paragraph 5, of the Prize Court Convention, the Court may disregard failure to comply with the procedure laid down in the enactments of the belligerent captor when it is of the opinion that the consequences of complying therewith are unjust and inequitable, cannot, as Pohl thinks, take from the Prize Court its character of a superior jurisdiction.[1] Why, then, cannot a higher, and on that account probably a wiser, jurisdiction be given freer rein with regard to statute law than the lower court ? We can also imagine, and perhaps it would be an essential improvement of our judicial system, that in the strictly national appeal the higher court, in contrast with the lower court, should possess a *ius corrigendi*, such as was possessed by the Roman prætor over the frequently obsolete or evidently unfair rules of the positive statute law. The case would be the same here. Accordingly

a police regulation, an appeal may be taken to the highest administrative court from the decision of the court of appeal in such complaint.

[1] Pohl (op. cit., p. 196) is mistaken in attributing significance to the fact that the decision of the Prize Court does not formally ' affirm ' or ' reverse ' the decision of the national court. The fact that there is no formal affirmation or reversal (see below) seems irrelevant so long as in fact the judgment of the national court is upheld or rejected. The case would be somewhat different if the wish expressed by the United States (p. 111, above) were to be adopted, that the states might be allowed to substitute a direct claim for compensation for an alleged unjust decision in the place of an appeal against the decision of the national prize court. In this case it could not be said, indeed, that there was a formal appeal to the higher court ; and under those circumstances Hold von Ferneck also concedes the arbitral character of the Prize Court, so that the Prize Court would have a different character according to the nature of the action. But the form of the action can manifestly not decide the point whether the Prize Court is a truly judicial institution or an arbitral court.

when Pohl thinks that the international law of a state could not be in conflict with its domestic law,[1] the answer is to be made, that such a conflict can easily be disposed of here. When the state which has signed the convention carries it into effect with the co-operation of the legislative organs of the state, it makes the provisions of the convention a constituent part of its national legislation. Now if the Prize Court Convention contains a provision that the International Court of Arbitration is to disregard the national law this constitutes in no way a conflict between national and international law, for the national legislature has provided that its national laws shall in the future possess only relative force, that they shall only be applied in the cases where they are not set aside as unjust by a higher international court. The legal situation is therefore precisely the same as if according to our present national judicial system the highest state court were to have the legal right to refuse to apply individual rules of positive law, when the consequences of so doing would be evidently unjust. Pohl is wrong when he reproaches the Second Hague Conference for having, in connexion with the idea of appeal 'in which it revelled', sacrificed itself to appearances, and when he says that this idea of appeal was a source of disastrous confusion.[2] He says that from a legal point of view the execution of the award is a free act of the state. That is a truly extraordinary assertion! Pohl forgets the distinction between the binding force of a legal principle and the possibility of judicial enforcement. There are in law, in particular in the public law of the state, a thousand legal principles the binding force of which no one doubts, although it is not possible to secure their enforcement by the help of judicial execution. No

[1] Pohl, op. cit., p. 190.

[2] Ibid., p. 197.

one doubts that the Kaiser has the legal duty of publishing the acts passed by the Bundesrat and the Reichstag, but no court can force him to do so. It is not his 'free act', it is simply a fulfilment of a constitutional duty when he undertakes to publish such laws, however little he may be in sympathy with their provisions. Precisely the same is true of the decisions of the Prize Court, which like all other decisions create a legal right in the individual case, *ius in concreto*; they must be carried out because there is an international obligation to do so. Its binding force cannot be doubted merely because the court does not possess the right of compulsory enforcement. In this case the absence of a power of enforcement by a higher authority is compensated for by a treaty obligation, assumed by the contracting states, to carry out the award themselves. It is superfluous when Article 9 of the Convention expressly says: 'The contracting powers undertake to submit in good faith to the decisions of the International Prize Court and to carry them out with the least possible delay.' It is certainly expressed here with all desirable clearness that the Prize Court itself has no executive power upon which the force of its decisions rests. The Prize Court cannot bring force to bear upon the captor state which loses in the suit, and the captor state does not comply with the decisions as if it were 'submitting to force' (Pohl), but rather it does so as one bound by treaty to do so, and not as Pohl thinks 'of its own free-will'.[1] Pohl's idea that the state has only obligated itself by the Convention 'to examine in good faith whether it can accept the decisions rendered', because it can refuse to fulfil them if its honour and its vital interests are in danger, is an alarming assertion. To submit in good faith, as Article 9 of the Convention

[1] Pohl, op. cit., p. 198.

requires, is not to examine in good faith, as Pohl thinks can be claimed for the state in question. Otherwise the value of the entire system of international arbitration can be seriously imperilled, for Article 9 of the Prize Court Convention is only a repetition of the earlier Article 18, now Article 37, paragraph 2, of the Convention for the pacific settlement of international disputes, which reads: 'Recourse to arbitration (previously, the arbitration convention) implies the engagement to submit loyally to the award.' [1] And no one has thus far dared to assert that a state has the right to examine the award of an arbitration tribunal constituted under the Arbitration Convention, to see whether the decision is consistent with its honour and its vital interests; rather all the jurists of the civilized world are agreed that there is a legal obligation to carry out the arbitral award. Whether the terms of an unfavourable award may endanger the honour and the vital interests of the losing state must be considered by that state before it has recourse to arbitral procedure.[2] If it has concluded an obligatory arbitration treaty without the saving clause, it loses this right, and must simply accept the arbitral

[1] Renault's report excludes all doubt on the question. With regard to Article 9 it is said that 'It goes without saying that the signatory powers accept in advance the decisions which the International Court may render, and it was thought proper to reproduce the formula contained in the Convention of July 29, 1899, with regard to arbitral awards'.

[2] Hold von Ferneck (op. cit.) rightly points out how small this danger is in the case of a prize dispute. According to Article 25 of the Convention the captor state can engage 'special agents, counsel and advocates', and it has a right to be represented upon the Prize Court itself by a judge; further, according to Article 18, it is entitled to appoint a naval officer of high rank to sit as assessor, but with no voice in the decision. 'Finally the Prize Court has nothing to do with strictly military operations, and it is these which primarily decide upon the outcome of the war, and not the attacks upon mercantile commerce.' Upon this last point, see below.

decision if it is to fulfil its obligations under treaty. Zorn's idea that even where the saving clause is not strictly inserted it must be regarded under the present status of international law as a necessary constituent part of every arbitration treaty providing for obligatory arbitration, seems to me still more doubtful.[1] The following justification is the only one that I can see for this idea. It is evidently impossible to subject the whole life of the state to a legal regulation which is binding without any moral exceptions, just as it is impossible to do so in the case of the individual subject. Now in the life of the individual there are undoubtedly circumstances which from a moral point of view justify him in disregarding positive laws. The same is true in the life of a state as in that of a nation. No philosopher will deny to a nation the right of revolution, but the jurist knows that this right can never be more than a moral one, and that it would be a negation of all public law if a legal right of revolution were recognized. What holds good of a revolution on the part of the people holds good for a revolution on the part of the government. When it is necessary for the preservation of the state, the government can set aside every public law, and it is well known that the Brandenburg-Prussian state owes to such methods its progressive development.[2] For a long time jurisprudence has recognized that it was impossible to build up a special law of necessity for the state as a theoretical basis for such acts, but that we are dealing here

[1] Zorn, memorial volume to Güterbock, 1910, p. 228.

[2] There comes to mind the manner in which the Great Elector and Friedrich Wilhelm I trod under foot the vested rights of the estates; and in general revolutions on the part of the government have played a great rôle in the history of Germany, and Bismarck could with justice write in his celebrated letter from Frankfort to von Gerlach that Prussia came to the front through revolution.

with acts which cannot find a place in a formal legal system. The individual who disregards a legal statute, the nation which takes up the sword against its ruler, the Prince who sets aside the constitution, all act in violation of formal law, though perhaps upon a higher moral right. This idea can be applied to international law, and accordingly the state which, in spite of an obligatory arbitration treaty not containing the saving clause, refuses to abide by an arbitral decision, is guilty of an unlawful act, but can from a moral point of view act in good conscience if it would otherwise place its existence at stake. It may be objected that this inference would be equivalent in practice to Zorn's theory, but this objection would be very superficial. From a psychological point of view it is of great importance whether I believe that I can appeal to a legal right, or whether I am knowingly violating the law. In the latter case I shall be conscious of the great responsibility of my act and I shall examine with far greater conscientiousness whether in so doing I am led not by self-interest, but by a sense of duty. If we hold fast to the principle, *pacta sunt servanda*, in the case of unconditional submission to arbitration, and see in the violation of such a treaty obligation a breach of law, this breach of law will be all the more evident where it is a question not of the contracting party refusing to submit to arbitration, but of the defeated party subsequently refusing, as Pohl advises, to submit to the award because it asserts that the award is in conflict with its honour and its vital interests. The injustice of such a proceeding is manifest. He who gives his consent to a treaty which provides for an arbitration tribunal for the settlement of his disputes with another person without the necessity of a special agreement, and then subsequently, because he has lost his case, refuses to carry out the award,

is not only guilty of a formal violation of law but of contempt of court as well.[1] In this case I can imagine with difficulty a situation in which the defeated party could appeal to a higher unwritten abstract right. It would be very ridiculous if the state were in such a case to appeal to its honour. The honour of the state certainly demands that it fulfil its treaty obligations and carry out in good faith an award unfavourable to it, that is, fulfil the award just as minutely as it would require the defeated party to do, if it had won the case. And how is it possible for the independence or the vital interests of the state to be endangered in a dispute over a prize ? The case is simply unimaginable. Prize disputes are essentially disputes of the second class ; as a general rule the issue is one to which a money value may be assigned and involves, moreover, the property of private individuals. It is only the absence of a truly impartial court, the fact that the captor state was the judge in its own cause, and that in consequence the decisions of its courts did not often enjoy real confidence, which has hitherto given to disputes of that kind at times a political character ; nevertheless the history of recent times furnishes, to my knowledge, no case where the dispute in this field has taken on a character which has made impossible a settlement by an impartial tribunal. Even the celebrated *Alabama* case, which did not involve a question of prize law, but which involved a claim by the United States for compensation from Great Britain for all the injury suffered by it from the capture of ships by

[1] In like manner Hold von Ferneck (op. cit.) says : ' It would be difficult in fact to give a greater exhibition of disloyalty than when a state, in agreeing to settle a dispute by arbitration, makes the mental reservation that it will abide by the sentence of the court, if the decision is in its favour, and will reject it, if it is not so.'

privateers of the Confederate States which had been built and armed in Great Britain, in spite of the bitter feeling on both sides, and in spite of the sixty-three million marks awarded, was settled peacefully by the award of September 14, 1872. It is precisely the peculiar character of prize disputes, namely, the fact that the question at issue in such disputes is clear from the start, which brought it about that so obstinate an opponent of obligatory arbitration as Baron Marschall suggested an obligatory court for disputes of this special class.[1] The assertion of Pohl of a right on the part of the defeated state to examine the decisions of the Prize Court to see whether it can accept them not only brings again in question the value of the Prize Court as one of the most important accomplishments of the Second Hague Conference, but, as was said above, it shakes the whole structure of arbitration. If this idea were to prevail, the result would be the deed of a fanatic. To be sure that is not now to be feared, but the deplorable fact remains that the support given to this idea by the German school will have the effect of diminishing the regard of foreign countries for the German science of international law, and at the same time their regard for the name of Germany. The same holds good of Pohl's idea that the powers, on the ground of an implied 'honour clause', which is said to be contained in the Prize Court Convention, can in advance evade procedure before this court. Hold von Ferneck rightly calls attention to the fact that the states participating in the Second Hague Conference did not wish to insert this 'honour clause'. 'How could a Conference which incessantly occupied itself with that clause have forgotten it in concluding so important

[1] See the proposal of the German delegation in the *Actes et documents*, vol. ii, p. 1071.

a treaty as the Prize Court Convention, especially as it was one and the same commission which dealt with the questions of obligatory arbitration and of the establishment of the Prize Court.' But if this clause was intentionally avoided in this instance it was from the desire to create an absolute obligation. The result is that there is an absolute obligation upon the states to submit to procedure before the Prize Court. And if we have laid down above that in national life there are cases in which the government is justified morally in disregarding positive law, so a formal breach of law in the present case would always constitute an immoral act. For if the state thinks that under all circumstances it must avoid proceedings before the Prize Court it need only release the captured ship or cargo and pay the required indemnity. Accordingly, with a relatively trifling sacrifice it can obtain its object without completely convulsing the international judicial system by a formal breach of law.

But just as we must emphasize greatly, in contrast to Pohl, the binding force of the decisions of the Prize Court, the obligation on the part of the defeated state to execute the award, so on the other hand we are just as little in accord with von Liszt, when he asserts that ' when a state permits the derogation from its sovereignty which results from an appeal being taken from the decisions of its national courts to a higher court of last instance which can decide upon the law and upon the facts, it has renounced a part of its sovereignty, and has subordinated its will to a higher will'.[1] Moreover, in recognizing from the characteristic absence of a power of enforcement that the decisions of the Prize Court were merely arbitral in character and that they did not rest upon the will of a higher legal authority

[1] Von Liszt, *Das Wesen des völkerrechtlichen Staatenverbandes*, p. 16.

set up over themselves by the states, but upon the will of the contracting states expressed in a treaty subject to denunciation,[1] we were forced to the conclusion that the establishment of the Prize Court did not fundamentally change the structure of the community of states. Von Liszt is wrong in thinking that this new institution introduced an authoritative element into the organization of states, which was up to that time of a strictly voluntary character, and that for this reason the popular theory of sovereignty should be modified, if science is to keep pace with life.

We have spoken above of the possibility provided for in the Convention that the International Prize Court might under certain circumstances disregard national laws. The principle holds good, not only for rules of procedure in accordance with the terms of Article 7, paragraph 5, but also for substantive principles of law, which are not covered either by a treaty between the two states or by a general rule of international law, and which appear inconsistent with the general principles of justice and equity.[2]

[1] Moreover, at the Conference itself the Portuguese delegate, Marquis de Soveral, at the fourth session of the First Commission on October 5, 1907, in like manner described the Prize Court Convention as a world arbitration convention.

[2] The possibility of the Prize Court disregarding even substantive principles of national law follows indirectly from the injunction given in Article 7, paragraphs 1 and 2, that the court is to be governed in its award first of all by the provisions of a treaty between the two states, then by the recognized rules of international law, and finally by the general principles of justice and equity. Moreover, at the second session of the First Commission, on September 10, 1907, this possibility was expressly affirmed by the reporter in the name of the author of the draft, in response to an inquiry of the Belgian delegate, van den Heuvel. In accordance with Article 7, paragraph 4, the Prize Court is under all circumstances to enforce national enactments only when, in accordance with Article 3, paragraph 2 *c*, the ground of appeal is the violation of an enactment issued by the belligerent captor.

We have already explained above that this authority of the Prize Court can be made a constituent part of the national legislation, and that in such case it would signify nothing more than if the superior national court were granted a freer position with regard to statute law, but that in no case does it postulate, as von Liszt thinks, the submission of the state to a higher supranational will. The fact that the whole Convention is contractual in character and subject to denunciation is proof to the contrary. The contracting states have set up for themselves a common judicial organ and have conferred upon this organ a very free status with regard to statute law of national origin, as the character of the international court by the very nature of things required. Moreover, the authority of the Prize Court never goes so far that it can formally annul national laws. It is no more competent to do so than is the judge of a criminal court competent to set aside a regulation of an administrative official which he regards as invalid, when a suit based upon such a regulation is being tried before him. In like manner the Prize Court can at most disregard the national law in an individual case, but cannot formally annul it. No more can we agree with von Liszt in considering it decisive for the nature of the international community that in paragraph 2 of Article 7, the Prize Court is enjoined, in the absence of statute law, to ' give judgment in accordance with the general principles of justice and equity '. We see in this provision nothing more than the express recognition of a modern law of nature, the assignment to the judges of a task which to us jurists of the younger generation seems simply self-evident.[1] Naturally it must

[1] See on this point my remarks in my treatise, *Die Organisation der Welt*, p. 7 et seq. Likewise Niemeyer holds in his treatise *Prinzipien*

not be overlooked in this connexion that in practice the jurisdiction here granted to the Prize Court is quantitatively much more extensive than that granted to the judge by the celebrated Article 1 of the Swiss Civil Code of December 10, 1907, whereby in the absence of law or custom the judge decides according to the rule which he would lay down if he were legislator.[1] That is due to the incomplete condition of the laws of maritime warfare, and to the fact that in this case the judge cannot take as his guide in finding the law the 'established theory and tradition', as is provided for in the Swiss law. But the comprehensive rules of the London Naval Conference, which have resulted from the distrust, perhaps not unjustified, of the too great liberty possessed by the Prize Court in the determination of the law, have now essentially limited the previous scope of the jurisdiction of the Prize Court. It is well known that this codification of the laws of maritime war left gaps to be filled in by the Prize Court, but we may ask, are all other fields of international law so far developed that the judge is not time and again forced to create the law in those fields? Who is ready to contest the analogous jurisdiction of the Permanent Court of Arbitration to create the rules required for the individual case, although the convention establishing the Court is silent upon the subject? But who would assert that on that account, by the creation of the Permanent Court with such jurisdiction, the powers have subjected themselves to a supra-national commonwealth endowed with legislative power. Here also

des Seekriegsrechts, Berlin, 1909, that the provisions for the jurisdiction of the Prize Court contained in Article 7 are not only proper in principle, but are even self-evident.

[1] Only this quantitative distinction in the scope of such provisions explains the criticism directed against them. See on this point, Pohl, op. cit., p. 170 et seq.

von Liszt greatly overestimates the scope of the liberty granted to the Prize Court in the law it is to apply. Von Liszt is simply incorrect in thinking [1] that each new legal principle laid down by the Prize Court constitutes thenceforth a constituent part of international law without the need of the approval of the contracting states, and that the legal principles laid down by the Prize Court during the war would forthwith acquire binding force for the belligerents, so that any deviation from them would be unlawful, and that each of these legal principles would have binding force by reason of the judgment of the Prize Court embodying them. The substantive scope of the judgments of the Prize Court is certainly not to be underestimated, but only in the sense that from the principles laid down by the Prize Court in its decisions a gradual development of the law of maritime war is to be expected. Here also a permanent judicial usage can open the way for the development of customary law, but does not itself constitute customary law.[2] The decisions of the Prize Court are, considered from a formal and juristic point of view, no more sources of international law than are the judgments of other international courts. Their practical significance for the development of law will, as has been said, be primarily dependent upon their permanence. But this permanence is not absolutely secured because of the fact that according to Article 16 each of the belligerent states has a right to a seat and a vote upon the Prize Court; so that in two contemporaneous or successive wars different rules of law could, under the influence of this member of the court,

[1] Von Liszt, op. cit., p. 17.

[2] So Pohl rightly observes in reference to the article by A. Schade, 'The Nature of Judicial Custom,' in the *Archiv für öffentliches Recht*, vol. xxv, pp. 308–9.

be taken as a basis in passing upon a similar state of facts. Von Liszt is also mistaken when he asserts that the legal principles laid down by the Prize Court in the exercise of its right to create the law, principles which will at most be developed in the opinion rendered by the court, forthwith possess binding force for the other states; likewise von Liszt's further assertion, that the international principle that each new rule of law is only binding in the states which have recognized it has been violated, is not true. Even if the decisions of the Prize Court were given such force that each legal principle laid down in the opinion of the Court should without further ado become binding upon the states signatory to the Convention, even then we could not think von Liszt justified in asserting that the rules of law proceeded from a supra-national authority. Rather in view of the peculiar contractual basis of the convention the authority of these legal rules is to be found not in the will of a supra-national commonwealth, but in the will of the sovereign states expressed by treaty. Moreover, since the newly found rules upon which the Prize Court bases its decision have, as was shown above, by no means thereupon the force of binding rules of law, we cannot agree with von Liszt that the principle of majority rule has been introduced into international law.

Finally, von Liszt, in order to prove the alleged change in the structure of the community of states, points out that in matters relating to prize the individual citizen is for the future likewise a subject of international law. Von Liszt has in mind the fact above mentioned that in certain cases an injured individual can take an appeal in prize matters against the captor state. This right of action is, to be sure, an international one, because it is based

merely upon the international convention relating thereto. Nevertheless von Liszt goes too far when he adds the further remark that 'one who can bring an international right of action is himself a subject of international law'. Rather we must make a sharp distinction in theory between sovereign states, as the sole full legal subjects of international law, and their citizens as endowed with certain international rights and duties. Why should not one who as a private citizen is not a subject of international law nevertheless be able to possess certain international rights and duties? It is not as if international law had hitherto been wholly taken up in the relations of state to state. Rather international law had already taken cognizance of a class of cases in which individual citizens were recognized as subjects of international duties. In matters relating to piracy, to breach of blockade, to the carrying of contraband by neutral citizens, and all such acts against international law, we cannot rightly speak of the violation of international law on the part of the state of which the said individuals are citizens, but merely of the violation of international rules by the individual himself.[1] International duties on the part of individual persons have therefore always existed, and the tendency has been to develop at length the attitude of regarding individuals in exceptional cases as the direct subjects of rights founded

[1] Rehm holds the same correct opinion in his article, 'Citizens as Subjects of International Duties,' pp. 53-55, in the first year of Kohler's *Ztschr. für Völkerrecht und Bundesstaatsrecht*. The list there presented by Rehm, Adler tries to extend (ibid., p. 614 et seq.). In my opinion we can concede such exceptional cases and yet hold to the principle that international law confers rights and obligations only upon the states themselves, not upon individuals. See on this question von Liszt's *Völkerrecht*, 6th ed., p. 44, note 2, and the citations there given.

in international law.[1] In many cases the individual has hitherto been able to demand from his government the application of international rules in his favour, because such rules were incorporated into the legislation of the state.[2] A mere international treaty taken by itself aims to confer, and can confer, of course, only rights upon one state as against another, and at best only a 'reflex right' can result in favour of the individual, so long as the international treaty is not incorporated into national legislation. An international legal status could not indeed be conferred upon the individual, so long as there is no international organization in existence. But the situation will of necessity quickly change when an international judicial system is established. Then for the first time the possibility of an individual 'obtaining redress' against a foreign state will become an actual reality.[3] Why, therefore, is international legal protection not to be granted to the individual; why should the private citizen, who, whether as a subject of a neutral or belligerent power, has been injured by a violation of the laws of maritime war, not be able to apply himself to the International Prize Court and be independent of the action of his own government? It was indeed only logical, in view of the new possibility of bringing the foreign state before the bar of an impartial

[1] See Jellinek, *System der subjektiven öffentlichen Rechte*, 2nd ed., p. 327. Von Liszt rightly calls attention to the fact that binding rules for the individual citizens of the several states are already contained in the 'Regulations of the International Commissions'.

[2] See the excellent treatise by Diena in the *Revue générale de droit international public*, 1909, vol. xvi, p. 57 et seq., and especially p. 70.

[3] If the Swiss delegation at the Second Hague Conference (*Actes*, ii, p. 791) asserted that the tendency was to give to each individual a direct legal claim against the foreign state without the intermediation of his government, it must be observed that this tendency was first manifested after the organization of the Hague international courts.

tribunal, that this right should be granted to the private individual, who in truth was the one directly injured.[1] The fact that the neutral power can in this case prohibit its subject from bringing his case before the court, or may itself undertake the proceedings in his place, is in harmony with the previous situation.[2] Nevertheless it is contrary to the nature of things and to the situation intended by Convention XII, when Curtius seeks to present the case in such a way as to make it appear that the private citizen comes before the Hague Court as a representative of his state, as if it were the injured party.[3] That is contradicted, as has been said, by the actual facts, since in reality the private individual is the one directly injured, and it is also contradicted by the declared intention of the contracting powers.[4] The statement is finally disproved, as von Liszt has rightly observed, by the fact that the enemy state is unconditionally denied this right of appearing before the Prize Court on behalf of its citizens. The whole situation

[1] German diplomacy unquestionably deserves credit for having clearly recognized this tendency in the development of international law and for having from the start, in Article 15 of its draft, admitted the private individual as party to the procedure, thereby making the procedure a legal suit between the owner and the captor state and freeing the captor state from responsibility for the decisions of its prize court, thereby avoiding diplomatic claims against these decisions. See the declaration of Baron Marschall on this subject at the session of July 4, 1907 (*Actes*, ii, p. 786).

[2] Article 4, no. 2. The neutral power can of course enter an appeal from the start, when the decision of the national courts affects its property or that of its citizens, or when it is asserted that the capture of an enemy ship took place in the territorial waters of the neutral state. See on this point Article 4, quoted on p. 104, note 5.

[3] This construction adopted by Curtius in vol. 41 of the *Revue de droit international et de législation comparée* is rightly attacked by von Liszt, *Das Wesen*, &c., p. 19.

[4] See the views of the German delegates referred to in note 1.

makes it clear, therefore, that it was the intention to secure to private individuals in prize matters under certain circumstances a direct international claim to legal protection before the Prize Court. Likewise it seems to me that we cannot properly speak here of a treaty in favour of third parties, as another writer has sought to do ;[1] for in a treaty in favour of third parties there are three legal persons, whose legal position is essentially the same. But when a number of states as legal persons of international law confer rights by treaty upon private individuals, these private individuals are not ' third parties ' in the sense of international law, since that position can only be held by states. Nevertheless there is no reason why a state should not be able to obligate itself to be a party to a suit brought before the Prize Court by the subjects of the other contracting state without thereby overturning the foundations of international law. The individual obtains thereby, to be sure, an international right of action, but without thereby becoming a legal person in international law.[2] This right of action aims at legal protection, and is in no way directed against the captor state, but is brought before the International Prize Court as the organ of those states which are parties to the convention establishing this Court.[3] When

[1] Diena, op. cit., p. 75.

[2] So Pohl rightly says, op. cit., p. 211.

[3] The fact that the new international right of action is in no way directed against the foreign state, but is brought before the International Prize Court itself as an international organ, is rightly pointed out by Diena (op. cit., p. 75), whereas von Liszt (op. cit., p. 19) confuses the said claim for legal protection with the claim for the release of a ship captured contrary to the rules of international law, which claim is directed against the captor state. With respect to the latter point no change was in my opinion made by the Convention. What is new is merely the claim for legal protection brought before an international authority, and this is directed, as has been said, towards the Court itself.

von Liszt further says that it is a matter of indifference for the existence of this claim for protection whether the international treaty has been adopted by national law or not, his statement is correct, but it holds good also for those earlier-mentioned duties of foreign citizens which are founded on international law, e.g., the obligation of not carrying contraband to the belligerents. In a certain sense, therefore, there have always been, in my opinion, 'international private rights and obligations' (von Liszt), only the significance of the individual in international law has become far greater since the progressive international organization has established international courts which can also be made available for the legal protection of individuals in international law. The closer the bond between the community of states becomes, and the more institutions it creates of a judicial and administrative character, the more are individual citizens of the contracting states brought within the control of international regulation and made the subjects of individual international rights and duties. But they will never thereby become actual *sujets mixtes*. For the power which confers upon them this legal status is not, as von Liszt thinks, a power greater than that of their own state. The claim for legal protection possessed by individuals has been given them by the voluntary contractual act, subject to denunciation, of their own state, and can be taken away again in like manner. The right of action is not guaranteed to the individual by a supranational power, a supreme political commonwealth, into which the civilized states have formed themselves. If that were the case the individual citizens of the community of states would in truth hold a double allegiance, such as we have in the German Empire, and international law would simply cease to be international law, and would be trans-

formed into world law. But this point of development has not yet been reached, and the Second Hague Conference and the International Prize Court there established have not to that extent changed the nature of the community of states.

We have seen that the establishment of the International Prize Court has not diminished the sovereignty of the contracting powers, and that the federation of states is limited by the sovereignty of the contracting powers.[1] Neither the Convention relative to the International Prize Court nor Article 53 of the Arbitration Convention, which confers upon the Permanent Court in certain cases an obligatory character, have therefore changed the structure of the world federation. Rather all of these institutions are very well adapted to a federation. 'The state which submits to an arbitral award', says Jellinek,[2] 'does not subject itself to the will of a foreign court, but merely leaves to a third party the logical duty of ascertaining the law. A federal court in a federation has the character of a permanent arbitration court, and it is, and remains, a voluntary court.' Likewise the fact that in the future private individuals can in prize matters come as plaintiffs before the international court, as an organ of the federation of nations, fits in very well with the nature of a federation. For if in a federation legislative decrees of the union are not as a rule strictly binding upon the individual citizens, but must first be made so by the express decree of the individual states, so that the citizens are always subject merely to the power of their own state and are not brought under the will of the federation, it being therefore expressly reserved to the individual states to determine what laws

[1] Jellinek, *Die Lehre von den Staatenverbindungen*, p. 172.

[2] Ibid., p. 177.

shall be binding upon the citizens, nevertheless the federation can establish common official bodies which operate directly upon the citizens without the mediation of the intermediate states.[1] That has already happened in certain international administrative unions which, as was shown above, differ from the federation of states only in that they have no political character. Von Liszt has several times called attention to the fact that the decrees of the International River and Sanitary Commissions are directly binding not only upon the contracting powers, but also upon their citizens.[2] 'The captain who takes his ship through the Suez Canal, or who voyages up the Danube from the Sulina mouth, is subject directly to the imperium, to the laws and the police administration, not indeed of the riparian state, but of the international union which aims to secure freedom of navigation for the ships of all nations and to protect the harbours of the Mediterranean from the introduction of the plague and cholera. . . . The regulations of the International River and Sanitary Commissions are directly binding, without the interposition of the sovereign states, upon the citizens of the states which are parties to the union.' In like manner it is to be hoped that the International Prize Court will, as stated above, one day act as a new influential organ in the name of the world federation under commission of those powers which are parties to the convention establishing it. At any rate we agree with Hold von Ferneck that the Prize Court Convention in no way offers ground 'for the most earnest deliberation' (Pohl), but that it is rather a splendid and successful work in the interest of all the powers, which is greatly to the credit of the Second Hague Peace Conference.

[1] Jellinek, *Die Lehre von den Staatenverbindungen*, p. 185.

[2] Von Liszt, op. cit., p. 10.

CHAPTER IV

THE TASKS OF THE THIRD HAGUE CONFERENCE IN THE WAY OF ORGANIZATION

Section 1. The Development of the Judicial Organization and the Execution of Foreign Judgments

We have laid down above that the first two Hague Conferences limited themselves to the establishment of a judicial organization, and in that respect present an interesting analogy to the beginnings of organization in the development of the individual state. It is evident that the development of these judicial organizations will occupy a large part of the work of the Third Hague Conference. At this Conference there will come up again the project for an obligatory world arbitration treaty, which will confer upon the Permanent Court of Arbitration a fixed jurisdiction independent of the will of the parties in the individual case, the project of the Judicial Arbitration Court, and in addition new plans are announced: there is the demand for the creation of a court for private claims against foreign states and for a superior court of judicature in matters relating to international private law.[1] It is impossible for us within the limits of this

[1] For literature upon this subject see p. 31, notes 1–4. For the Judicial Arbitration Court see the work of Wehberg, which is to form the second volume of this series. For the need of an international court before which private individuals can bring suit against debtor states, see the excellent article by van Eysinga, 'Obligatory arbitration between states or suits by individuals before an international court,' in the *Ztschr. für Völkerrecht und Bundesstaatsrecht*, 1911, pp. 5, 6. In the same volume

work to discuss these projects in detail, each of which would require a volume to itself. But we may make an observation upon one point, namely, that all these projects are intrinsically connected with one another. We have already stated that the opposition of the German Empire to obligatory arbitration has been condemned almost unanimously even by German international law jurists;[1] and rightly so, for, as in the law for the prevention of strikes proceedings before the arbitral court are made obligatory, even when only one of the parties appeals to the court, so the court established by the powers at The Hague could at least have been made obligatory for a whole group of subordinate disputes, without thereby endangering the existence, the honour, or the independence of the several states. This principle was indeed recognized by the Second Hague Conference in the resolution adopted with the co-operation of Germany, which reads as follows:

It is unanimous

1. In admitting the principle of compulsory arbitration.
2. In declaring that certain disputes, in particular those relating to the interpretation and application of the provisions of international agreements, may be submitted to compulsory arbitration without any restriction.

But if the Third Hague Conference should succeed in adopting an obligatory general arbitration treaty, as is certainly to be expected,[2] the present judicial organization

is the interesting reference to two provisions of the arbitration treaties concluded by France with Haiti and Guatemala, by which private individuals are given the right to bring suit on their own account before the Hague Court.

[1] See p. 93, note 1.

[2] In spite of German opposition, this treaty will, I think, at length be adopted at the next Conference; see what is said below upon regulations as to voting.

cannot possibly satisfy the new needs. It is for that reason that the idea of the Judicial Arbitration Court played so great a part at the Second Hague Conference in connexion with obligatory arbitration. And Nippold rightly calls attention to the strikingly illogical position of the German delegation in defeating obligatory arbitration and then, in spite of that, energetically advocating the new Permanent Court. Such a court without a fixed jurisdiction of any kind would indeed, as Bourgeois well said, 'be a frame without a picture'.[1] But Nippold himself makes a mistake in the other direction when he thinks that obligatory arbitration could have been advocated, and yet the permanent judicial court rejected. It seems to me unquestionable that obligatory arbitration demands at the same time the existence of a truly judicial court, and that the judicial organization of the Permanent Court of 1899 would remain behind the needs of the new situation. It would indeed be theoretically possible that, even if there were an obligatory arbitration treaty between the states, certain disputes should be settled by an international court at The Hague and that for each concrete dispute the arbitration court should be composed from the list of judges of the Permanent Court in accordance with the present Convention. But that would be an exceedingly impracticable method of proceeding. It would be necessary in that case, just as before the adoption of the obligatory arbitration treaty, that a *compromis* should be concluded between the contending parties, in the sense of Article 52 of the Convention for the pacific settlement of international disputes, for the settlement of every case coming under the

[1] Nippold, *Die zweite Haager Friedenskonferenz*, vol. i, p. 225 et seq., where he quotes the statements made at the Conference by Martens, Bourgeois, and the Marquis de Soveral.

collective world arbitration treaty, although the most important element of this *compromis*, namely, the agreement to have the dispute in question decided by the award of the judicial organ of the international union, would be anticipated by the general world arbitration treaty. Thus there would be nothing left for the *compromis* except the more formal points, namely, the period for the appointment of the judges, &c. It seems to us that when it has been once agreed that certain disputes shall henceforth be disposed of by an international judicial court, it follows logically that this court should be constituted once for all, so that it may be actually at hand when it is needed.[1]

But in addition to this there is another consideration which shows that the present system of the Permanent Court is simply entirely inadequate. This is the need of a judicial court which is accessible to private individuals. We have stated above that the closer the international union of states becomes, and the more its international organization is developed, the better can this organization be made available for the legal protection of individuals in international law, and we have seen that the establishment of the Prize Court has led the way in this direction. When, therefore, the demand is made that, after the model of the Prize Court, it shall be made possible for private individuals

[1] The mere creation of a permanent delegation with a certain jurisdiction, which Nippold (op. cit., p. 222) would like to see realized out of the project for the Judicial Arbitration Court, cannot satisfy this need. Likewise the project of the Russian Government, whose efforts Nippold praises, for the perfecting of the Hague Arbitration Court, in accordance with which the whole body of judges of the Permanent Court would meet at The Hague once every year and appoint three of their members who must be ready at all times during the following year to constitute a tribunal, appears entirely insufficient.

to press their claims against foreign states before the judicial court of the international union, and to have decisions in the field of international law passed upon by such a court, there must be some more accessible court in existence at The Hague, to which such persons can appeal. Hold von Ferneck rightly speaks as follows with regard to the jurisdiction of the Prize Court:

> Consider the difficulties it must lead to if a *compromis* must first be concluded between the belligerent and the plaintiff in each prize case! How shall this *compromis* be settled when, as will be the rule, it is not a state which appeals to the Prize Court, but the citizen of a state? Shall a belligerent conclude treaties with hundreds of private citizens and business firms?

But all that would hold good, *mutatis mutandis*, if a private individual in time of peace desired to bring a foreign state before the international court to answer to a suit. We see, therefore, that the development of the international judicial organization demands imperatively the establishment of a new and truly permanent judicial court at The Hague, such as the Judicial Arbitration Court appears in a certain sense to be. Would, then, the Judicial Arbitration Court in the form proposed by the Second Hague Conference really be so dangerous an innovation? We have already in another place expressed our regret that this project could not be definitely realized at the Second Hague Conference, and we can now advocate its establishment with all the greater energy because after a careful study of the Prize Court we have learned that such a permanent judicial court fits in very well with the present structure of the international union, and that it is at the same time a truly arbitral court, which does not prejudice in the slightest degree the sovereignty of states. Nippold is simply in error

when he continues to assert that the sovereignty of the states would be endangered by the project for the Judicial Arbitration Court, and that it does violence to the essential idea of arbitration. In this latter connexion we need only once more recall the example above given, that lessor and lessee in concluding the contract of lease can enter into a general arbitration treaty relating to disputes arising from the lease, in accordance with which they submit to the award of certain persons who, as it were, constitute in themselves a court. In that case the parties would be obligated to have a concrete dispute settled by these very persons and would be no longer at liberty to appoint such judges as they chose for the individual case. But no one would fail to recognize the distinction between these judges, whose commission rests in the last instance upon the will of the parties (although upon a single act of the will which imposes a general obligation for all disputes), and those judges who decide by virtue of the supreme authority of the state. Of all the objections which have been raised against the Judicial Arbitration Court there remains, therefore, only the difficulty which alone has hitherto prevented the actual establishment of the court, namely, how can a limited number of judges be reconciled with the claims which on the one hand the great powers, and on the other hand the other states of the union, believe that they must advance in this matter on the basis of the traditional doctrine of equality in their co-operation. We shall treat of this problem more in detail below. It is well known that in the case of the Prize Court the Conference succeeded in reaching a compromise of interests upon this question,[1] and the above-mentioned proposal of the United States was based on the

[1] See above, p. 102.

fact that the Prize Court should be simply accepted as a general world arbitration court in the sense of the Judicial Arbitration Court.[1] This method would manifestly be preferable to the present situation in which we have not yet got beyond the Permanent Court of 1899, with the result that a truly permanent court at The Hague does not yet exist, and for this reason we have expressed the hope once before that the other powers might adopt this proposal. But we cannot regard this as an ideal solution, and it is greatly to be desired that the Third Hague Conference should bring into existence a better organization of international justice than would result from the mere extension of the jurisdiction of the Prize Court. In creating the Prize Court the idea was merely to establish a special court for a well-defined class of disputes arising from public international maritime law. As these disputes are possible only on the occasion of maritime war, and war is fortunately an exceptional situation in the relations of the members of the international union, the Prize Court Convention does not look to the permanent presence of its judges at The Hague, and does not even require that a delegation from it be present at The Hague; moreover, the Convention requires that the judges must be men of known competence in questions of maritime international law;[2] accordingly the intention was primarily that they should be scholars who had given scientific study precisely to this field of the law of maritime war. But the more it is to be desired that specialists in the law of maritime warfare should perform the functions of prize judges, the more absurd it appears that the general world arbitration court, such as the Judicial Arbitration Court is to be, should be

[1] See above, p. 113.

[2] Article 10 of the Convention.

constituted in that manner.[1] Prescinding entirely from this point, the functions of this court would probably require the permanent presence of the judges at The Hague, if, as is certainly to be expected, an obligatory world arbitration treaty is entered into; and it appears already doubtful whether a mere delegation of the whole body, consisting of three judges, as was proposed for the Judicial Arbitration Court, would satisfy the needs of the situation.[2] It would certainly not do so, if the new international court at The Hague were to be made available for the legal protection of private individuals in the manner described above. We see, then, as has been said above, that all these matters are very closely connected with one another, and the further the jurisdiction of the international judicial court is extended, which now is the question under debate, the more necessary is it, in so far as relates to the organization of an international judicial system, not only to go beyond existing institutions, but even beyond proposed ones. The Judicial Arbitration Court, in the form pro-

[1] Article 2 of the Convention relative to the Judicial Arbitration Court rightly requires that the court be composed of persons fulfilling the conditions qualifying them in their respective countries to occupy high legal posts, or of jurists of recognized competence in matters of international law; see p. 95, note 1.

[2] The entire body of the Court is to meet in session regularly only once a year; see Article 14 of the Convention; and the delegation, apart from the right which does not concern us here of settling the *compromis* under certain conditions, is only to be competent for the 'summary procedure' in the sense of Part 4, Chap. 4 of the Convention for the pacific settlement of international disputes. But if the disputants are not to be regularly satisfied with the summary procedure, the cases to be referred to the entire court might, under the existence of an obligatory world arbitration treaty, so accumulate that the single session of the Court once a year would be at least a very long one. In all probability the need would gradually arise that the entire court should remain in session at The Hague.

posed, appears to be, before it has yet been realized, already behind the new demands with respect to the jurisdiction of the Hague Court or rather behind the needs connected with those demands, and if it is desired at the Third Hague Conference to take the project of the Judicial Arbitration Court as the pattern of the new institution, this project will have to be essentially remodelled, either in the sense that the whole body of the court must be permanently present at The Hague, or it may be in the sense that the delegation consisting of three judges shall possess an essentially enlarged jurisdiction. We can conceive in particular that this delegation might be competent for all affairs in which a private individual is in need of international legal protection, because such cases are, considered from the standpoint of the states, always of relatively subordinate importance. These judicial functions of the delegation could be completed by granting an appeal to the entire body of the court. Whether, indeed, the delegation would be able to take account of all claims which might be brought before it from all sides because of its enlarged jurisdiction, seems after all questionable. In any case the whole development tends toward the establishment at The Hague of a permanent court of justice, which shall not only have a fixed jurisdiction, in contrast to that of the Permanent Court of Arbitration and in analogy with that of the Prize Court, over an entire class of legal disputes, but whose judges shall be in part at least permanently present at The Hague and constantly occupied with their duties. The effort has already been made to create a certain bond between the various Hague courts, by providing, as has been said above, that the members of the proposed Judicial Arbitration Court could also be appointed judges and deputy judges of the Prize Court. It would be

still better if instead of this personal union an organic connexion could be established between the two last-named Hague courts, the Judicial Arbitration Court with its enlarged jurisdiction in the manner above mentioned and the International Prize Court. Just as the two courts are to make use of one registry, and just as the same Administrative Council is to act for both,[1] a unity could be created with respect to the courts themselves. This would, in my opinion, truly be an essential step forward. What we need in the long run is a unified permanent court with several distinct chambers, one for each of the fields in which the court must act. With such a court the Prize Court need only take over the functions of a special chamber, which would consist of experts in international maritime law, just as in the German Empire our superior courts in the larger districts have a special chamber for commercial affairs. The judges of this chamber naturally would not need to be in permanent session at The Hague, no more than was proposed for the Prize Court. Likewise the special delegation of the Prize Court would simply be dispensed with, because the work intended for it, which relates merely to external procedure,[2] would simply be taken over by a general delegation of the judicial court or by another chamber in permanent session. But probably the mere permanent delegation of three judges would not be thought, as has been said above, to answer the purpose if the jurisdiction of the court were so essentially enlarged, but it would be found necessary to erect side by side with the chamber for prize matters other chambers which, in contrast with the former, would be in permanent session. One chamber would have to decide disputes between the

[1] See above, p. 106 et seq.

[2] See Article 48 of the Prize Court Convention.

states themselves on the ground of the obligatory world arbitration treaty and within its limits, another chamber would have to decide disputes arising from international private law, and a third would have to decide financial claims of private individuals against foreign states.[1] Naturally one and the same judge can be a member of several chambers—a plan which would recommend itself so long as it is to be assumed that the functions of a single chamber would not demand the entire time of the judges. An appeal could be regularly allowed from the decision

[1] Accordingly, counting the Prize Court, there would be four chambers in existence. With respect to the organization of a unified judicial court with distinct chambers I am following here the proposal of the French diplomat, Jarousse de Sillac, who took part in the Hague proceedings not only as secretary to the French delegation, but also as secretary to the Conference itself. Jarousse de Sillac also proposes four chambers of the judicial court: the first for matters of international private law, the second for disputes arising from the administration of the affairs of the international unions, the third for customs disputes, and the fourth for prize matters. On this I think the following observation is to be made: If, as is to be expected, an obligatory world arbitration treaty should be adopted at the Third Hague Conference, and if in accordance with our proposal a special chamber were to be created for these matters, there would be assigned to it the subjects which Jarousse de Sillac desired to assign to his second and third chambers. For disputes arising from the international administrative unions were regarded at the First Hague Conference as coming under the list of obligatory arbitration (see *Conf. Internat.*, vol. iv, p. 147). But there does not seem to me to be the slightest doubt that obligatory arbitration, when it finally comes to be adopted, will be extended to include customs disputes as well. The questions involved here are of a strictly pecuniary kind and are of secondary importance, having no political character whatsoever. Even the German Empire, so averse to obligatory arbitration, has in all of its more recent commercial treaties adopted the obligatory arbitration clause for tariff provisions; see Zorn, *Das Deutsche Reich und die Schiedsgerichtsbarkeit*, 1911, p. 25, note 23. The treatise by Jarousse de Sillac here referred to bears the title 'The Periodic Peace Conferences', and is to be found in the *Mémoires sur le Contact des Races*, London, 1911, p. 448 et seq., mentioned above on p. 15, note 1.

of the individual chambers to the entire court,[1] but in so doing the judge of the first instance would naturally have to be excluded from the full session in that particular case. Likewise, in such matters as are not to be referred to the special chamber of the new court, on the ground of the obligatory world arbitration treaty, the contending powers must be left free to resort to the whole court which, by reason of the larger number of judges, would as a rule give so many guarantees of a fair decision that the parties could be satisfied in this case to dispense with an appeal.[2] Moreover, the states might appropriately still be allowed to retain the right to have recourse in matters of optional arbitration to the Permanent Court of 1899, which would have to continue with its looser organization, because by reason of its peculiar character it offers for certain cases, so to speak, political advantages and facilitates an appeal to arbitration. We cannot see in the co-existence of the two courts an ' absurdity ', to use Nippold's above-mentioned expression, but rather the evidence of the great political wisdom of the delegates to the Conference, who did not wish to impugn approved institutions, but at the same time desired to satisfy new needs. The provision that the judges of the proposed Judicial Arbitration Court should, so far as possible, be appointed from among members of the Permanent Court of Arbitration seems likewise an excellent one.[3] This provision will be retained even if the new court should, as we propose, come into existence with a somewhat different constitution. For this personal

[1] The members of the chamber for prize matters, being specialists in the law of maritime warfare, and being present at The Hague only under exceptional conditions, need not be called upon to offer their services for this purpose.

[2] In this case also the members of the prize chamber could be excluded.

[3] See Article 2, paragraph 2, of the convention in question.

union between the judges of the two courts would give expression to the idea that both courts are organs of one and the same international union. This would, to be sure, also be made clear by the fact that the same International Bureau and Administrative Council act for both courts, prescinding entirely from the fact that, as we have stated above, the Permanent Court pronounces its judgments in the name of the international union. The permanent Hague court proposed by us, with its separate chambers, would naturally give rise to the same difficulties upon the question of the apportionment to judges as have thus far blocked the project of the Judicial Arbitration Court. These problems, which are bound up with the doctrine of the legal equality of states, will be discussed in a subsequent section.

In this connexion, however, we might refer to another subject, the regulation of which as a whole would be just as much in keeping with the imperative needs of modern commercial intercourse as the present gradual codification of international private law, and for which the new judicial organization of The Hague could immediately be made available, namely, the execution of foreign judgments. In the year 1908 the German commercial treaty union, in a petition to the Imperial Chancellor with respect to the execution of German judgments in foreign countries and *vice versa*, pointed out how unsatisfactory the existing legal situation was with respect to the compulsory execution of foreign judgments.[1] It is clear that the judicial power of compulsion does not extend in principle beyond the territorial limits of a country, and the execution of foreign judgments originally took place in every instance merely

[1] See in connexion with the following remarks the doctor's dissertation composed at Marburg, under my direction, by Hans Diehl: 'The compulsory execution of foreign judgments, a problem of international law.'

as a matter of comity. Gradually the legal principle of the execution of foreign judgments found its way into almost all countries, and has accordingly become, in almost all cases, a recognized part of substantive law. Perhaps it may be asserted that, as a result of corresponding legislation in the different states, a legal principle of international law has been established according to which the states have mutually a right that the judgments passed in their territory shall as a rule be executed in foreign countries also. And if it is desired to continue to base the execution of foreign judgments only upon the *comitas gentium*, at least we must attribute to this concept the sense which Stoerk has associated with it in his recent book.[1] According to this theory an important characteristic of comity is its transitional nature, the fact that a voluntary principle develops into a compulsory one, that what was at first done as a favour by the state becomes an international custom; and this custom is not a vague and indeterminate thing, rather it has an objective character after the analogy of the commercial customs of civil law. Moreover, its observance is not optional on the part of the foreign states, but is compulsory through the use of retorsion. The latter construction is indeed the more correct one, because there are always a few states which have not incorporated into their laws the principle of the duty of executing foreign judgments, but only execute them in those cases where they are obligated to do so under treaty.[2] But whether we can

[1] See the excellent treatise by Stoerk, *Völkerrecht und Völkerkourtoisie*, memorial to Laband, 1908, particularly p. 153.

[2] This is true of France, Holland, and Russia; see Diehl, p. 10, note 2, and the references there given. The attitude of Greece is unique. Greece distinguishes between foreigners and citizens. If both parties are foreigners the judgment is executed without question, but if one of the two parties is a citizen the judgment is re-examined as to the law applied.

speak of a principle of international law or of a mere commercial custom, in any case the execution of foreign judgments is one of the common needs of civilized states. The manner in which this need is met at the present day is, however, entirely inadequate. In certain states the execution of foreign judgments is made dependent upon whether the claim in question has been properly decided by the foreign judge according to his own law.[1] In other states the national law provides for at least a re-examination as to the procedure, before the foreign judgment can be considered as subject to execution, but in respect to details the picture presented here is a most variegated one. There is frequently to be found in such laws a general clause, for example, in section 81, paragraph 1, of the Austrian regulations, to the effect that it must be examined whether the defeated party has been deprived of the right of defence because of an irregularity in the procedure.[2] In this way the procedure before the foreign court is examined in all its details, a provision which could readily be made use of to obstruct the proceedings. Even in cases where the national law is less exacting with respect to the re-examination of questions of procedure, serious inconveniences constantly arise. That is true, for example, of the re-examination of the jurisdiction of the foreign court. This question constitutes, indeed, the crucial point of the whole problem of the execution of foreign judgments. Shall it be examined whether the foreign court was competent in the specific case, or shall it only be examined whether the courts of the said state had jurisdiction in general. Even

[1] Such a re-examination as to the law applied takes place in France, where it is termed a *révision au fond*, and also in Belgium and Sweden.

[2] See Klein, 'The Execution of the Civil Judgments of German Courts in Austria,' in the *Ztschr. für intern. Privat- und Strafrecht*, vol. vii, p. 97.

when the latter alternative is adopted and the regulation of the substantive and local jurisdiction is left to the foreign state, the difficulties are in no way removed. There remains still the problem whether the question of the jurisdiction of the foreign court is to be decided according to the law of the foreign state in question,[1] or whether the general jurisdiction of the foreign courts shall merely be measured according to the law of the state in which the judgment is to be executed,[2] or whether perhaps the jurisdiction of the foreign state must be justified by the law of both states. The last solution would unquestionably be the best one.[3] But such a correspondence between the rules for the jurisdiction of the courts of both states would of itself presuppose the regulation of such jurisdiction by treaty between the states. A convention must state in clear terms how far the jurisdiction of the contracting states extends, and accordingly fora must be created which are common to the contracting parties.[4] But there are further questions which require that the subject of the compulsory execution of foreign judgments shall be regulated by treaty. The execution of a foreign judgment which is legal both in substance and in procedure could produce certain unlawful effects in the state executing it, e. g., if a judgment required a compulsory marriage, as has been previously possible even in our country.[5] On

[1] The difficulties which arise from this method are pointed out by Diehl, op. cit., p. 19 et seq.

[2] Diehl gives us an interesting practical example of how unsatisfactory this method is, op. cit., p. 21.

[3] So Asser holds in the *Revue de droit international privé*, vol. i, p. 82.

[4] Diehl expresses a similar opinion, op. cit., p. 24, where he refers to Meili and von Bar.

[5] Such an effect forbidden by the laws of the state would, moreover, not only result when the judgment called for an act forbidden by our

that account the legislatures of almost all countries have by the passage of a preventive law, which von Bar aptly names a safety-valve against unjust decisions, protected themselves against the necessity of executing foreign judgments which are unacceptable as being contrary to morality. But even here there are the widest deviations of practice among the states. According to a British general clause foreign judgments are, for example, not to be executed when they involve gross injustice. But the British courts find a case of 'gross injustice' when the foreign judge has not applied British law in a case where in the view of the British judge it should have been applied! A more liberal recognition of foreign judgments is to be found in the German Code of Civil Procedure, sec. 328, no. 4:

> The recognition of a foreign judgment is prohibited when such recognition would offend against morality or against the purpose of a German law.[1]

A number of states have made the recognition of foreign judgments dependent upon the fact that reciprocity is guaranteed; but even in this respect there remain many unsettled questions, prescinding from the fact that not all of the states require reciprocity.[2] Must reciprocity be

laws, but also when the ground of action was immoral according to our ideas; for example, a claim brought forward on the ground of concubinage, polygamy, &c. Theoretically, to be sure, this is a substantive re-examination of the foreign judgment, but it is one which has nothing to do with the legality of the foreign judgment. See Diehl, op. cit., p. 27.

[1] Diehl offers the following draft *de lege ferenda*: 'The recognition of the judgment of a foreign court is prohibited when the force to be applied in the execution of the judgment would offend against the principle of public order or against morality.' For a critical discussion of the problem involved, see Diehl, p. 27 et seq., where the literature of the subject can also be found.

[2] This last is true in particular of Italy, and also of Basel City and the Canton of Tessin. Norway likewise takes the same attitude both in theory and practice.

guaranteed at the time the judgment is rendered, or at the time when the execution of the judgment is sought to be obtained in the foreign country ? [1] Cannot a state, after it has secured the execution of its judgments in a foreign country in important cases by corresponding legislation, repeal the laws in question unilaterally, so that our judgments cannot be executed in the foreign state ? Is it sufficient for reciprocity in the recognition of judgments that the foreign state is actually in the habit of executing them, is there need of a declaration to that effect on the part of the government or of the minister of justice, or is a legislative regulation of the question in all cases necessary ? All of these points have given rise to sharp controversy. The following example will best show what impossible consequences result from the present situation of reciprocal recognition. Reciprocity is guaranteed with respect to Germany only in certain cantons of Switzerland,[2] not by the Swiss Federation itself. The Reichsgericht has on that account refused to execute judgments of the Swiss federal court.[3] The result has been the very unique situation that we execute the judgments of courts of first instance of certain cantons, and on the other hand do not execute the manifestly better and more carefully reasoned judgments of the highest court of the Federation.

[1] We are reminded of the case of the city of San Francisco, which, in order to secure that decisions rendered by its courts against German Insurance Companies after the earthquake of 1906 should be executed in Germany, subsequently guaranteed the execution of foreign judgments by a special law of February 27, 1907. The Supreme Court declared the law without effect on other grounds than the fact that it was passed subsequently to the said decisions. See *Entscheidungen des Reichsgerichts in Zivilsachen*, vol. lxx, p. 434 et seq. For this case and the literature relating to it, see Diehl, p. 48 et seq.

[2] For example in Basel City, St. Gallen, Graubünden.

[3] In the case of Zorn von Bulach *v.* Gerber, December 16, 1904. On this case see Diehl, p. 54, with the references in note 1.

How, then, are we to get away from all this jumble, the embarrassing consequences of which must make themselves more and more evident as economic life becomes daily more international in character ? The only possible way is that of concluding an international treaty embracing all the states.[1] The most zealous champion of this idea is Mancini, who as early as 1884 invited a conference to Rome with the object of concluding such a treaty.[2] Unfortunately his project came to nought, as did also that of Gericke, who had proposed as early as 1874 a conference at The Hague with the same object.[3] The prevailing theory, in holding that the conclusion of individual treaties must be recommended[4] on the ground that the commercial relations

[1] The demand made in the petition of the Commercial Treaty Union, that foreign judgments be placed upon the same footing with domestic judgments as regards their execution, has for the present no prospect of being considered, and taking the civilized states as a whole it goes decidedly too far, although such an agreement is possible between two of them. Thus far there has been only one instance of such a treaty which, without setting up courts, decrees the execution of judgments without any further conditions. This is the treaty between Baden and Austria, May 18, 1838–1856 ; see Jettel, *Handbuch des internationalen Privat- und Strafrechtes mit Rücksicht auf die Gesetzgebung Österreich-Ungarns*, 1893.

[2] See Mancini, ' The advantages . . . of international treaties to secure the uniform decision of conflicts between the laws of different states,' in the *Journal de droit international privé*, vol. i, p. 221.

[3] See Constant, *De l'exécution des jugements étrangers dans les divers pays*, Paris, 1890.

[4] Such is the opinion of Diehl (op. cit., p. 56) in agreement with von Ullmann, Meili, and others, as well as with a resolution of the Association for the reform and codification of the law of nations, Milan, 1885, and the Institute of International Law in the *Annuaire* of 1880, vol. i, p. 96. Likewise Zitelmann in his treatise on International Private Law, vol. i, p. 15, thinks that for the establishment of an international agreement upon this subject we must wait for the progress of general culture in those countries where at the present day the powers still think it necessary to withdraw their citizens from the jurisdiction of the domestic tribunals.

and the confidence between the separate states are too unlike to make it practicable for all states to unite upon the same conditions for the execution of judgments, overlooks the fact that at the present day national legislation has at length entirely abandoned any differentiation in this respect of the individual foreign states according to the degree of civilization of the said state and the respect held for its courts. As a matter of fact we find in national law that the execution of foreign judgments is regulated as a general rule without reference to individual states of a similar or different degree of civilization.[1] If that is possible in the case of national legislation, why should it not also be possible in the case of international legislation. The whole development of international law urges the conclusion of the collective treaty, because in this age of international commerce it is no longer individual states but the whole body of them with which commercial relations are held, however these relations may differ in amount. A system of individual treaties would make necessary the conclusion of more than 2,000 treaties in all, and possibly would finally lead more or less to the same practical result, since each state would in this case demand of every other the most-favoured-nation treatment.[2] A properly drafted

In my opinion, however, the continuance of consular jurisdiction does not exclude the adoption of a general treaty for the execution of judgments. Such a treaty would necessarily take into consideration the question of jurisdiction, and in the countries where there are consular courts a decision of the domestic tribunal against our citizens would not be passed by a court of competent jurisdiction, and therefore could not be executed in Germany.

[1] The liberty to differentiate between foreign states actually exists at the present day only in cases where the national regulation rests upon the principle that judgments are not to be executed without special treaties. But that is only exceptionally the case. See above, p. 166, note 2.

[2] Already at the present day the adoption of a most-favoured-nation

general treaty would, therefore, in my opinion be in place at the present day, and at most the contractual obligation would be limited to property claims which call for the payment of money or the delivery of movable goods.[1] There is nothing in such a treaty to prevent a state from making further concessions in individual treaties than are made in the collective treaty, in cases where both parties have special confidence in the judicial institutions of the other state.[2] Moreover, there are in existence at the present day between smaller groups of states a number of collective treaties providing for the execution of foreign judgments upon special subjects.[3] But if, as is greatly

clause with respect to the execution of foreign judgments is frequently to be found in commercial treaties, e.g., in the commercial and customs treaty between Germany and Serbia of September 21, 1892 (*R. G. Bl.* of 1893, p. 269, Article 2, paragraph 4).

[1] This proposal is made by Haeger, *Die Vollstreckung von Urteilen und Schiedssprüchen im internationalen Rechtsverkehr*, in the petition of the officers of the Berlin Chamber of Commerce, Berlin, 1910, p. 241; likewise Sperl, 'Treaty between Austria and Germany for the execution of judgments,' in the *Ztschr. für internationales Recht*, 1910, vol. xx, p. 58.

[2] The attitude of the Baden-Austrian treaty referred to on p. 171, note 1, would in this connexion represent the greatest mutual concessions; but between such a treaty and the contents of the collective treaty there are other possible gradations.

[3] The international Convention concerning railway freight transportation, concluded October 14, 1890, provides in Article 56 that:

> Judgments pronounced after hearing of the parties or by default by the judge having jurisdiction in virtue of the provisions of the present convention shall, when they have become executory in accordance with the laws applied by the said judge, be declared executory in the signatory states of the convention by the competent authorities under the conditions and in accordance with the forms established by the legislation of that state, but without the complete revision of the case.

Further, Article 12 of the Hague international Convention relative to private international law, concluded November 14, 1896, provides that:

> Judgments by which the claimant or the intervening party is condemned to pay the costs of the proceedings shall be made executory

to be desired, the subject of the execution of foreign judgments were to be regulated by an international treaty, the rules of international law therein adopted would have to find their ultimate exposition in an international court, as the rules of international private law. If in the latter case the needs of commerce imperatively demand an international court,[1] so in the former case the need is equally great. And in so doing an international need of commercial life would be satisfied without endangering in any way the national individuality of peoples and of states. Accordingly, the international court at The Hague, one chamber of which would have to be given jurisdiction for the final adjudication of questions of international private law, would, in accordance with a collective treaty, previously concluded, for the execution of foreign judgments, be empowered to pass upon these questions finally; and here also the private individual who thinks he has been unjustly refused execution by the national courts, or against whom the national courts have, as he thinks, unjustly granted execution, could apply directly to the international court at The Hague, as is first provided for in the Prize Court Convention. A special chamber should properly be created for this jurisdiction of the new Hague court.

in each of the other contracting states by the competent authorities, when the claimant or the intervening party, in accordance with the law of the state where the action is brought, has not been required to give bail or to make a deposit.

Finally, the Act of 1868 for the navigation of the Rhine contains in Article 40 a collective treaty of a similar character. This article reads :

> The decisions of the tribunals for the navigation of the Rhine in each of the riparian states shall be executed in all the other states under due observance of the forms prescribed by the laws of the country where they shall be executed.

[1] See Zorn, *Das Deutsche Reich und die internationale Schiedsgerichtsbarkeit*, 1911, p. 46.

Section 2. The Periodicity of the Conferences

The further development of the international union, which we have found to be a world federation, must be brought about in the direction of periodic meetings of the Hague Conferences. When the First Hague Conference broke up, the delegates had, as we have seen above, limited themselves to the establishment of a judicial system. The periodic return of the Hague Conference was at that time demanded only by the pacifists, and was not officially discussed within the circle of the Conference. To be sure it was implicitly recognized in a certain sense that the Hague Conferences should succeed one another periodically. For not only the addresses of individual delegates of high standing, but likewise the *vœu* adopted by formal resolution in the Final Act refer to the problems of a future Conference.[1] But again it was the pacifists to whom we owe primarily the actual meeting of a Second Peace Conference. From among their numbers the wish was repeatedly expressed that another Conference should be held. In particular the Interparliamentary Congress at St. Louis, in 1904, took up the matter and sent a special delegation to President Roosevelt in order to induce him to call a new Conference.[2]

[1] Consider, for example, the part to be played by successive Conferences as expressed in the concluding address of Baron d'Estournelles, which was received with the highest approval: 'But in order that this germ may develop it must become the object of constant solicitude, and it is for this reason that we must hope that our Conference is not separating forever. It has been a beginning, it must not be an end. Let us express the wish, gentlemen, that our countries, by bringing about other gatherings such as this one, will continue to serve as a body the cause of civilization and of peace.' Meurer, op. cit., vol. i, p. 49.

[2] A selection from this address and the answer of the President are to be found in Nippold, *Die Fortbildung*, &c., p. 533, note 8.

The credit for the steps thus taken by the Interparliamentary Conference is, as has been said, due unquestionably to the pacifist movement. Those who know cause and effect and who are acquainted with the origin of the Interparliamentary Union[1] cannot but smile at the efforts of the 'national' press in Germany, on the occasion of the meeting of the Interparliamentary Union in Berlin in 1908, to make a sharp distinction between the interparliamentarians and the pacifists. The official greeting to the interparliamentarians by the German Imperial Chancellor was obviously meant to be conciliatory to 'national' readers. In truth that was the first homage paid by the higher authorities in Berlin to the peace movement, and it was not without reason that the Interparliamentary Union delayed so long before it risked a meeting in the capital of the German Empire. In consequence, a scholar who had regarded the whole movement disapprovingly, namely, Baron von Stengel, stated with great regret that in his opinion the pacifists 'had so far prepared the ground in Germany for their efforts, that they had dared to hold an International Peace Congress at Munich in the fall of 1907 and a meeting of the Interparliamentary Union at Berlin in the fall of 1908'.[2]

But after this digression let us turn back to the Interparliamentary Congress at St. Louis in 1904. At that time not only was Roosevelt requested to take steps to bring about the meeting of a Second Hague Conference, but at the

[1] See on this point the excellent report in the *Annuaire* of the Interparliamentary Union for 1911, published by Chr. L. Lange, Brussels, Leipzig, 1911, p. 4 et seq.

[2] Baron von Stengel, *Weltstaat und Friedensproblem*, p. x. As has been said above, it is entirely consistent with the actual situation that the meeting of the interparliamentarians is here spoken of as having been arranged by the pacifists.

same time a programme was drawn up for this Conference which included a discussion of 'the opportunity of creating an international congress which would meet periodically to discuss international questions'.[1]

The first effort to bring about the agreement of the powers in favour of a Second Hague Conference had effect. The United States undertook the initiative with the powers and then yielded out of courtesy to the Czar, who had issued the call for the First Hague Conference. The international conference at Brussels in the year 1905 not only expressed its thanks to Roosevelt, but again placed on its programme for the deliberations of the new Conference, under the fourth heading, 'the periodicity of general conferences of the states'.[2] When the meeting of the Second Hague Conference was already secured, the Interparliamentary Conference of 1906 at London once more advanced this proposal.[3] At the Second Hague Conference itself the United States had the intention of proposing that the Conference should be held every three to five years, without waiting for a special invitation.[4] Meanwhile the opinions of the delegates were sounded unofficially, and the result was that no official action was taken upon the request because a majority could not be found in its favour. Nevertheless the two Hague Conferences adopted in a weaker form the plan advocated by the Interparliamentary

[1] The complete programme can be found in Nippold, op. cit., p. 532.

[2] Nippold, op. cit., p. 534.

[3] 'The conference expresses the wish that the Conferences of The Hague be given a more real influence and that the powers enter into an agreement to make this Conference periodical.' See Nippold, op. cit., p. 552.

[4] Concerning the attitude of the two Hague Conferences towards the desire of the pacifists that the conference become periodical, see Fried, *Die zweite Haager Konferenz*, p. 149.

Union. The *vœu* was unanimously adopted that, after a period corresponding to that which had elapsed between the first and second Conferences, a third Conference should take place.[1] This *vœu*, as Huber has justly observed, expresses in veiled terms the desire that the Hague Conferences shall be periodic.[2] These *vœux* of the Hague Conferences are indeed curious things. They are expressed by the representatives of the governments themselves, that is to say, by the very governments which can forthwith carry them out if they sincerely desire to do so. Fried is right to that extent in calling attention to the illogical character of such *vœux*.[3] If the representatives of governments unanimously desire a thing, why can they not adopt a resolution to that effect ? But in spite of this contradiction we need not agree with Fried in questioning the sincerity of the governments. Actual life does not follow along in the strictly logical paths of philosophic thought, and, like many other decisions of life, these *vœux* may, in spite of their deficient logic, originate in a practical need, namely, that of laying down guiding lines for the future without taking definite legal steps under all circumstances. Immediately after the Second Hague Conference the German Government, in spite of all the reluctance which it had manifested in other respects toward the Hague problems, declared in its *White Book* that it was ready to give effect to the suggestion with respect to the meeting of a Third Hague Conference. At the Berlin session of the Interparliamentary Union the question of the periodicity

[1] A special agreement of the powers will be needed to determine the precise time of the Third Hague Conference ; see the text of the *vœu* in the German *White Book*, p. 41 ; in the meantime word comes through the press from The Hague that the Third Conference will meet in 1915.

[2] Huber, *Beiträge zur Kenntnis*, &c., p. 124.

[3] Fried, op. cit., p. 166.

of the Hague Conferences was again brought up.[1] The well-known Danish pacifist, Bajer, in an address at that time, pointed out that the *vœu* of the Second Hague Conference with respect to the meeting of the Third Conference was incomplete, as had already been pointed out at the Conference itself by the first Roumanian delegate. It did not say who was to call the next Conference. He, Bajer, thought it self-evident that in view of the generous initiative taken by Russia, this duty should be left in the hands of that state. It should not be forgotten, however, he said, that the rulers of states are mortal men. For that reason it would be desirable in the interest of the periodicity of the Conferences that the powers should conclude a treaty with that object in view. Bajer further thinks that the last Hague Conference recommended the creation of a committee entrusted with the organization of the next Conference.[2] This committee could, he said, propose the method of calling future Conferences. The whole question would then, so Bajer proposes, be referred to the renewed discussion of the individual groups, so that a later Interparliamentary Conference could give definite expression to the *vœu* in question.

As a matter of fact the periodic meeting of the Hague Conferences seems at the present day already more or less secured. The advocacy of a Third Hague Conference in an official resolution of the Second, although it is formally described as a *vœu*, appears, as Huber rightly says, to be 'one of the most important demonstrations of an official nature in favour of the existence of a permanent com-

[1] See the report of the 15th Conference of the Interparliamentary Union, September 17–19, 1908, at Berlin, published by H. Hilger, Berlin, Leipzig, 1908, p. 37 et seq.

[2] On this point, see below.

munity based upon law and common interests', and indeed, we may add, of an organized community based upon law and common interests. We see how hesitatingly and cautiously the diplomacy of the civilized world followed in this question the desires of the pacifists. What could be better evidence of this than the above-mentioned fact that the First Hague Conference did not venture to take action with regard to the Second, but merely spoke in vague terms of the problems of a later Conference, whereas the Second Conference adopted, at all events officially, a *vœu* in favour of the Third. It will be the task of the Third Conference simply to pass a resolution that the Conference shall be periodical. It is a hopeful sign for the adoption of this resolution that the French diplomat, Jarousse de Sillac, who took part in both Conferences, not only as secretary to the French delegation but also to the Conference itself, who is permanent secretary of the French preparatory commission for the Third Conference, and who accordingly is especially competent to speak upon this subject, has written an interesting article entitled *Les conférences périodiques de la paix*,[1] in which he says, 'There is every reason to believe that the principle of periodicity will be recognized in a definitive way'. Accordingly, von Liszt's attitude, as expressed in his text-book on international law, the most widely circulated in Germany, is in sharp contradiction of the facts. Here we read, as we have said above, that:

> Since that time the idea of a permanent assembly of states, or one meeting from time to time, has played a part only in the Utopian dreams of those writers who have visions of a world state.[2]

[1] See the *Mémoires sur le Contact des Races*, published by Spiller, London, 1911, p. 448 et seq.

[2] Von Liszt, op. cit., p. 136.

The desire of periodic Hague Conferences is rather a common ground upon which pacifism, science and diplomacy at length meet.[1] Moreover, this desire is one which is founded deep in the nature of things. With the exception of the International Union for the Suppression of Traffic in White Women, all of the other international administrative unions resort to an international conference as their chief instrument, which in the case of the Universal Postal Union is, it is true, called a ' congress ', the periodic meetings of which are provided for by treaty. All of these international administrative unions are, however, in importance far behind the work of The Hague, which is directed towards the maintenance of peace in the civilized world, the security of states, and the prosperity of peoples.[2] If those special administrative unions, with a single exception, repay the trouble of regular conferences of states, how much more would that noble aim do so which is an object

[1] See, for example, Nippold, *Die Fortbildung*, &c., p. 524 et seq., and p. 541 et seq. ; also Oppenheim, *Die Zukunft des Völkerrechts*, memorial to Binding, 1911, p. 22, and numerous other authors.

[2] See the preamble of the Convention for the pacific settlement of international disputes, which reads as follows :

> Animated by a strong desire to concert for the maintenance of the general peace ; resolved to second by their best efforts the friendly settlement of international disputes ; recognizing the solidarity which unites the members of the society of civilized nations ; desirous of extending the empire of law, and of strengthening the appreciation of international justice ; convinced that the permanent institution of a court of arbitration, accessible to all, in the midst of the independent powers, will contribute effectively to this result ; having regard to the advantages attending the general and regular organization of arbitral procedure ; sharing the opinion of the august initiator of the International Peace Conference that it is expedient to record in an international agreement the principles of equity and right on which are based the security of states and welfare of peoples ; being desirous of concluding a Convention to this effect, have appointed as their plenipotentiaries, to wit : (the names of the plenipotentiaries follow).

of the Hague Conferences? It is all the same whether one considers the international union established at The Hague in 1899 as a loose federation, which is our opinion, or as a mere judicial union.

The question, where the Peace Conferences are to hold their periodic meetings, has been at length decided in favour of The Hague; the question, how often shall meetings be held, depends merely upon practical considerations. Nippold thinks they should be held every five or ten years. The first period is decidedly too short. It is conceivable that the conference of the international union will finally develop into a truly permanent one, just as the Bundesrat of the German Empire, which was regarded by the imperial constitution merely as a periodical organ, has already become permanent in the first generation of the Empire. It will soon be five years since the close of the Second Hague Conference, and yet its results have not all been secured; in particular the establishment of the International Prize Court is still in question, as has been pointed out above. But it will not be sufficient to prepare for the new Conference by merely proposing the ratification of the resolutions adopted by the last one, but theory and practice must draw up its programme in the light of the results of the preceding Conference. That means, accordingly, that the large body of scientific material which is contained in the proceedings of the Conference must be carefully studied by specialists in this field. Now, as experience shows that a long time passes before the proceedings of the Conference come into the hands of scholars, and as the number of those persons who are competent and inclined to undertake the scientific study of these proceedings is, unfortunately, not particularly large in the world of culture, and especially in Germany, several years must

always go by before this scientific study takes place. At any rate it has not yet been done after almost five years.[1] It is not sufficient for this purpose that each important subject should be studied successfully by some one scholar, but it must be required of science at best that in each of the leading civilized nations each important field of the work of the Conference shall be treated of by several scholars.[2] Only in that way could a *communis opinio doctorum* be developed. But in order to estimate properly the work of the Conferences the opinion of scholars alone is not of itself sufficient. Practical experience will always bring the most valuable stimulus for the modification and development of the institutions created at The Hague. Such institutions as the Permanent Court with its wholly new international procedure must act in a greater number of cases before we can successfully undertake to develop and improve them. As the result of the zealous efforts of the pacifists new proposals are continually being put forth, which must be tested as to their intrinsic worth and practicability. It was not without reason that the Second Hague Conference thought two years would be necessary merely for the international preparatory work for the Third Hague Conference. This international work of preparation must naturally be preceded by a national one. Now if we are obliged to state that after almost five years

[1] In the preface to his commentary upon the Arbitration Convention, written in May 1911, Wehberg rightly says that the scientific study of the problem of obligatory arbitration, as well as of the question of a truly Permanent Arbitration Court in accordance with the proceedings of 1907, is an urgent necessity. The latter work has meanwhile been done by Wehberg himself, and it will appear as no. 2 of this series dealing with the 'Work of The Hague'.

[2] Concerning the *vœu* of the Second Hague Conference with respect to the special preparatory commission, see below.

the results of the Second Hague Conference have not yet been put in a clear light, not to say scientifically studied, and that the national and international preparatory work for the Third Hague Conference is yet to be done, we come to the conclusion that the period which the Conference of 1907 thought should elapse before the Third Peace Conference is indeed too short.[1] I consider a period of ten years between the Conferences to be under all circumstances desirable for the present, especially in the interest of the great cause. And I think so especially for the following reason. Great progress cannot be made in securing the periodicity of the Conferences or at least in assuring their vitality unless they are supported by the desire and determination of the civilized nations. Public opinion must stand behind them, otherwise the law remains a dead letter. But this public opinion of the masses cannot be changed over-night, as is necessary for the work of The Hague. I have in mind in particular the lack of understanding which the work of The Hague has thus far met with in my own country. I have already called attention in another place to the underlying reasons for

[1] As has been said above, the press has recently informed us that the Third Hague Conference is to be held in 1915. If so, the terms of the 'recommendation' of the Second Hague Conference upon this point would be carried out, because the period between 1907 and 1915 corresponds to that between the First and Second Conferences. On the part of the pacifists it has been asserted, indeed, that the Second Conference intended something else by its recommendation. It was only because of the war in the Far East and of the Pan American Conference that the continuation of the work of The Hague was postponed, and there is no reason why these facts should enter into the determination of the period which must elapse before the Third Conference; see *Die Friedenswarte*, 1912, pt. 2, p. 69. In our opinion, however, the above-mentioned intrinsic reasons argue in favour of a longer period between the Conferences.

this.[1] We Germans with our national state hobbled on a hundred years behind the great civilized nations of the west. We came centuries later than France and England into international life; up to the year 1870–1 we really shared in that life only passively, while foreign states took advantage of the domestic weakness of a Germany which only existed on the map, and almost every generation saw foreign armies in our country. Out of this condition of political distress, which was at the same time an economic situation of the worst kind, the idea of nationality working with the Prussian military power delivered it. Is it any wonder then that large bodies of educated patriots have at the present day no understanding of international ideas? If, therefore, as I have already said elsewhere, the future is to stand under the sign of the reconciliation of nationalism and internationalism, the German people must be given time to adjust themselves to the changes of the times and gradually get accustomed to international ideas.[2] If, as has been shown above, the obligatory world arbitration court was defeated at the Second Hague Conference because of the German opposition, in spite of the fact that the exception of questions involving honour and vital interests removed from it every element of political danger, unfortunately it cannot be said that in so doing our diplomats were acting in opposition to the educated classes of the

[1] In addition the domestic political situation of the last three decades in Germany was not, indeed, of a character to admit of the adoption of new ideas, because it was itself dominated by the idea of warding off social democracy, which had brought internationalism into discredit with the upper classes, just as internationalism was formerly suspected by the Conservatives because it was represented by the Liberals and the Democrats.

[2] See the introduction to my *Organisation der Welt*, special ed., Leipzig, 1909.

country. But possibly this opposition would not have been effective, or at least would not have been justified by the political leaders of the country, had the project been brought up for discussion some years later, at a time when the idea of arbitration as such had taken deep root in Germany. Accordingly, those who wish to promote effectively the idea of the Peace Conferences must in my opinion advocate that for the present a period of ten years intervene between the Conferences. For as things now stand the dissimilar attitude of the leading civilized states with respect to the rate of the development of the international organization can easily give rise to a disagreement which would be fatal to the whole work. If before the expiration of the regular period the need should arise to call an exceptional conference for some special object of whatever kind, there is nothing to prevent the states from doing so. It would only be necessary to agree by treaty as to how many states must propose such an exceptional conference, in order to have it duly convened. Quite recently the proposal has been made that the Hague Conferences be granted relief by making a temporary division of their work which would separate the political work, in particular the problem of the limitation of armaments, from the work of international law.[1] This proposal has arisen from the idea that the chief task of the Hague Conference is the development of international law, and that this task is not one of a political character. But we have shown above that from the beginning the work of The Hague has realized other aims. In relation to the political tendencies which led to the calling of the First Hague Conference, and in relation to the object of the arbitration convention ('the main-

[1] See Nippold, *Die zweite Haager Friedenskonferenz*, pt. ii, p. 267, note 1.

tenance of the general peace'), the development of international law appears merely as a means to higher political ends. But entirely apart from all this, it is not possible to develop the important problems of international law in such a technical and legal way as to eliminate entirely political issues. One need only recall, for example, how the latent political opposition between Great Britain and Germany acted as an obstacle in many matters at the deliberations of the Second Hague Conference, especially in the proposed codification of the law of maritime warfare. How easily Great Britain would have been led to concede the abolition of the law of prize in maritime war, if Germany had been ready to come to an agreement with Great Britain for the contractual limitation of naval armaments. We see, then, that progress in the great legal questions is wholly dependent upon the political concessions which the contracting powers are willing to make to one another, and upon the measure of confidence or of distrust which they entertain with respect to the international situation; so that the jurist has never the deciding voice at the Hague Conferences. From these considerations it will appear that the separation of the juristic and the political tasks is wholly impossible.[1]

That the International Conference will meet at The Hague seems to be conceded by the fact that the Dutch Minister of Foreign Affairs, as President of the Administrative Council, sends out the invitations at the appointed time.[2] Moreover, in connexion with the periodicity of

[1] Nippold's proposal on this subject is all the more unintelligible to me in that this author has repeatedly called attention in a striking way to the close connexion of the theoretical and political considerations which come into question in the development of international law; see in particular the statement on p. 240 et seq., op. cit.

[2] In this I agree wholly with Nippold, *Die Fortbildung*, &c., p. 525.

the Hague Conferences the demand has more than once been made for a special organ which should carry out the resolutions of the Conference in the intervening period, arrange for the adhesion of third states, furnish information, prepare for the coming Conferences, issue the call for them, determine the order of proceedings, &c.[1] Upon this I have the following remarks to make. The history of the Hague Conferences thus far shows that there was not the slightest inclination to entrust to an international organ at The Hague any jurisdiction which exceeded the mere formal administration of business. For the mere formal administration of the business of the international union an excellent organ exists in the Administrative Council of the Permanent Court, which as we know is composed of the diplomatic representatives of the civilized states accredited to The Hague, under the presidency of the Dutch Minister of Foreign Affairs.[2] While this Administrative Council was originally intended to act only for the Arbitration Court, we have learnt above how a certain jurisdiction has also been assigned to it with respect to the Prize Court, and this indeed to the Administrative Council as a whole. Accordingly the states of the Hague international union evidently regard this Administrative Council at present as their organ for all the affairs of the union. Should the

[1] In the year 1905 the Interparliamentary Conference at Brussels advocated that the Second Hague Conference should not only consider the periodicity of the Conferences, but also 'the effect to be given to the *vœux* and the decisions of the Conferences, and the preparation of succeeding Conferences'. The reporter, Gobat, explained this proposal, which was brought forward at the close of the meeting, as being a demand for a special organ with the above jurisdiction. Since that time the proposal has often been renewed. Of recent instances I refer to no. 6 of the 'Fundamental Principles' which Oppenheim has laid down for the international union in *Die Zukunft des Völkerrechts*, p. 23.

[2] Nippold is of the same opinion, op. cit., p. 542.

periodic meetings of the Hague Conferences bring with them new tasks of a purely administrative character, they will properly be referred to the Administrative Council. But for the preparation of the subject-matter of the legislation of the Conference the Administrative Council with its purely diplomatic composition would of course be hardly a suitable body, while, as we shall learn below, the Conference itself provided for that work by appointing a special commission. The question of the presidency of the Conference would also have to be regulated by statute.[1] When once it has been provided by statute that the international union shall hold periodic Conferences, the existence of an international organization of the civilized world for the object of maintaining peace will be manifest to all eyes, whereas up to the present, because of the unique structure of the Permanent Court of Arbitration, as we have seen above, even competent scholars have more or less overlooked this organization. Precisely for that reason it is greatly to be hoped that the Third Hague Conference will agree by treaty to make the Conferences periodical.

Section 3. The Preparatory Committees and their Tasks

We have just shown that the diplomatic Administrative Council at The Hague is not a suitable organ for the preparation of the subject-matter of the work of the Conference. On the other hand, the pacifists have already recognized for some time that such preparation of the subject-matter

[1] Oppenheim (op. cit.) calls attention to this in order that disputes as to precedence and petty jealousies may be avoided. But the proposal made by Oppenheim, that before each Conference the presiding state should be determined by lot, does not please me. It might happen that in that way a very unsuitable person would become president.

of the Conferences will be indispensably necessary.[1] This fact was recognized at the Conference itself. Let us hear what so experienced a member as Zorn has to say on the subject: [2]

> In connexion with this (namely, the periodicity of the Conferences) there is a second question which was actively discussed at the Peace Conference of 1907—the preparation of the work of the Conference. At both Conferences, and in particular at the second one, there was a general conviction that the deliberations upon the difficult questions of international law which were put upon the programme had been very insufficiently prepared; the constant result of this want of preparation was a waste of time in long deliberations, confusion in the proceedings, and a complete fiasco in important questions upon the programme. This was particularly true of the Fourth Commission which had for its president the late Russian State Counsellor, Martens, and which was entrusted with the questions of the law of maritime warfare, with the exception of the Geneva Convention and the question of mines; the results of its work were very insignificant. . . . But likewise in the First Commission *A*, which was entrusted with the questions of arbitration, the lack of sufficient preparation of the questions to be discussed and, in particular, the question of the so-called obligatory arbitration court

[1] See p. 188, note 1, and the selection from the address by Gobat given in Nippold, op. cit., p. 534. At the Interparliamentary Conference at London in 1906 the following resolution was adopted:

> The Conference expresses the wish that the powers, in appointing their representatives to the Second Hague Conference, shall draw their attention to the advantages of constituting a permanent consultative council entrusted with the work of completing and extending the code of international law.

I believe I am not wrong in interpreting this resolution to mean that the work of the permanent consultative council is to be preparatory to the Hague Conferences, which will have to codify such preparatory work into law.

[2] Zorn, in the memorial volume to Güterbock, 1910, p. 205.

was fatal, while in Section *B* of this Commission, which dealt with the International Prize Court, thanks to the excellent preparation of this subject on the part of Germany and Great Britain, both of which states came before the Conference with fully developed drafts, a fairly complete result was attained. The Second Commission, which dealt with the laws of war on land, had no difficult questions before it at the Second Conference; in the third commission the question of mines, thanks to the remarkable talent for compromise possessed by its president, the Italian Ambassador Count Tornielli, who has since died, . . . was worked out to the extent of being formulated into a draft convention, which, however, in view of the fundamental differences of opinion upon important points, has no prospects of being converted into law.

From these words we can well see in how many fields the lack of preparation acted as an obstruction to the work of the Conference. But this general impression led to the result that the Conference, in adopting the *vœu* with respect to a third Conference, at the same time called the attention of the powers

To the necessity of preparing the programme of this Third Conference a sufficient time in advance to ensure its deliberations being conducted with the necessary authority and expedition.

In order to attain this object the Conference considers that it would be very desirable that, some two years before the probable date of the meeting, a preparatory committee should be charged by the Governments with the task:

1. Of collecting the various proposals to be submitted to the Conference;
2. Of ascertaining what subjects are ripe for embodiment in an international regulation; and
3. Of preparing a programme which the Governments should decide upon in sufficient time to enable it to be carefully examined by the countries interested.

> This committee should further be entrusted with the task of proposing a system of organization and procedure for the Conference itself.[1]

If the Conferences themselves become periodic, so also will the preparatory committees become periodic.[2] They may be distinguished from the permanent consultative council which the Interparliamentary Union advocated in London in 1906, but which Nippold has rejected as unnecessary and useless,[3] only by the fact that the preparatory committee meets periodically and is not in permanent session. If the future Hague Conferences follow along the approved lines of their predecessors, the task of the preparatory committee will be regularly a twofold one. It must direct its labours in the first place to the collection, examination, and presentation of proposals for the development of the organization of the world federation, and in the second place to the codification of the existing rules of international law. For its character will be fixed by the tasks of the Conferences themselves, whose work it is meant to facilitate. When Nippold says of these Conferences:[4] 'They are meant and should be nothing else than international law conferences in the proper sense of this word; accordingly, everything which has to do with politics must be absolutely kept out of them and their character strictly preserved,' he is shown to be incorrect by what has been said above. Of course, the Hague Conferences have not occupied themselves with such political questions as involved problems in which only certain states have a direct interest, e. g., the so-called

[1] German *White Book*, p. 41.

[2] The French diplomat, Jarousse de Sillac, also sees in the preparatory committee a regular, if not permanent, organ of the international union. See the above-mentioned article, p. 457.

[3] Nippold, op. cit., p. 557.

[4] Ibid., p. 542.

Alsace-Lorraine question, which we Germans cannot for a moment consider as an international problem, and which on that account properly affects only France itself. On the other hand, we have already repeatedly shown that all the work which is done at the Hague Conferences for the maintenance of the general peace is political work, and in so far as the institutions created for this object are developed and perfected will political work be done in the future also by the Hague Conferences and their preparatory committees. The work of the Hague Conferences in the way of organization will, to be sure, by no means be exhausted in this political work. The judicial organization thus far created not only acts as a judicial system between the states for the maintenance of peace in the civilized world, but the International Prize Court will, as we have seen, secure to the individual the protection of law. Disputes which arise from the exercise of the law of prize and in which one of the parties is regularly a private citizen have long ceased to be of a political nature, while all disputes between states are political disputes, because of the character of the contending parties and because of the possible procedure which they may resort to, namely, war. The more the international judicial organization is developed in the interest of the individual, e. g., through the establishment of a court for private claims against foreign states, for disputes arising out of international private law, for disputes concerning the execution of foreign judgments, &c., the more indeed the work to be done by the Hague Conferences and their preparatory committees ceases to be of a political character. Moreover, the work of The Hague in the way of organization cannot always be limited to the development of international courts. Of this we shall speak further below. Side by side with the work of

organization there is, as has been said, the work of codification. Theoretical proposals for the codification of international law date, indeed, far back in the history of our science.[1] At the present day, however, these efforts have grown far greater in number and have been transferred from the field of theory to that of international practice. The gradual solution of the great problem of the codification of international law by the adoption of conventions at the Hague Conferences has proved itself entirely practicable. This plan is also advocated at the present day by the pacifists in particular. As has been said, the Interparliamentary Union at its meeting at London in 1906 advocated a permanent consultative council for the codification of international law.[2] In the year 1908 the interparliamentarians again expressed this wish at their meeting at Berlin. The former Minister of Justice of Roumania, Dissescou, at whose motion the London resolution of 1906 for the codification of international law was adopted, stated in 1908, at Berlin, that two things were necessary for arbitral procedure, a court and a law, and that the presence of a legal code would be of the greatest advantage to the principle of obligatory arbitration. Upon the motion of Dissescou the following resolution was adopted :

> In view of the fact that the effective working of any international court depends upon the establishment of generally recognized principles of law, the Conference expresses the wish that the Third Hague Conference

[1] The first recommendation for the codification of international law came towards the end of the eighteenth century from Bentham. On Bentham's proposal, see Nys in the *Law Quarterly Review*, April, 1885 ; also his treatise on international law, vol. i, chap. 7, p. 166 et seq. ; as well as his article in the *American Journal of International Law*, vol. 5, no. 4.

[2] The history of this resolution dates back to the session at Christiania in 1899 ; see Nippold, op. cit., p. 557 et seq.

may take up the codification of international law, giving consideration to the preparatory work done in particular by the Institute of International Law.[1]

Because of the fact that only a limited number of powers were invited to co-operate in formulating the Declaration of London of February 26, 1909, the Interparliamentary Union at its meeting at Brussels in 1910 took the following stand with regard to efforts for codification:

> The Sixth Interparliamentary Conference,
> Considering that the Declaration of London of February 26, 1909, has been drawn up by an international conference in which only a limited number of powers were invited to participate,
> Considering the justice and the importance of the principle of the participation of all the states in conferences given over to the discussion of the problems of international law,
> Repeating the resolutions of former interparliamentary conferences,
> Expresses the wish that in the future all the civilized states be invited to participate in these conferences.[2]

Accordingly it was thus provided that the codification of international law should in principle be reserved to the whole body of civilized states, as was the case at the Hague Conference, and not to a small group of them. On the other hand, however, the Interparliamentary Union at Brussels in 1910 urged that the conventional law of the Declaration of London should not only be ratified, but also be adopted into the common international law of the whole body of civilized states. This is contained in the following resolution:

> The Sixth Interparliamentary Conference,
> Considering the importance of an international agreement upon the laws and customs of maritime war,

[1] See p. 95 of the report of the Berlin meeting of 1908.

[2] See the *Annuaire* of the Union, p. 67, resolution no. xv.

> Considering in particular the utility of this agreement for the proper work of the International Prize Court provided for by the Hague Convention of October 18, 1907,
>
> Notwithstanding the imperfections of the Declaration, to which it calls attention elsewhere,
>
> Recommends the ratification of the Declaration of London by the signatory powers and the accession to it of the powers not represented at the Conference.[1]

In both cases we can give our assent to the principles involved in the resolutions of the Interparliamentary Union. It is true that by reason of the particularly difficult character of the subject-matter of the laws of maritime warfare, it was perhaps proper that in this case the codification should by exception be undertaken by the smaller group of maritime powers especially interested in this matter.[2] But the Conference itself did not pretend that the rules codified by it, although according to the preliminary provision they 'correspond in substance with the generally recognized principles of international law', should become directly binding upon the states not participating in the Conference. It rather expresses in the preamble the hope that a work so important to the common welfare will meet with general approval, and in Article 70 of the codification itself it is said in the same spirit that the powers represented at the London Naval Conference attach particular importance to the general recognition of the rules which they have adopted, and therefore express the hope that the powers which were not represented there will accede to the Declaration. Accordingly, there

[1] *Annuaire*, p. 65, resolution no. ii.

[2] This is Nippold's view, *Die zweite Haager Friedenskonferenz*, vol. ii, p. 256, note 1, in agreement with von Ullmann, *Jahrbuch des öffentlichen Rechts*, vol. iv, p. 9.

is little reason to fear that the precedent of the London Naval Conference of 1909 will have an injurious effect in causing the whole body of states of the Hague union to be no longer regarded as a competent body to legislate upon questions of international law. Such an effect would be justly met with vigorous resistance. Another strictly practical question is whether in the preceding case the states not invited to the Conference are to be content with a subsequent formal co-operation by a mere recognition of what has been done, or whether they are to undertake in common to examine the subject-matter of the Declaration and possibly revise it. The above resolution of the Inter-parliamentary Union recommends to them the first method, and the contracting powers themselves evidently had in mind that method only. For it alone is in keeping with the method provided for in Article 70 of the Convention for the subsequent accession of other states.[1] But on the other hand it is difficult to see why the powers not represented at London should allow their right of co-operation in the subject-matter of the Declaration to lapse. The fact that the ratification of the Declaration by the signatory powers themselves has been delayed by reason of the above-mentioned opposition of the British House of Lords, and the further fact that the Second Hague Conference expressed

[1] According to Article 70, paragraph 1, the British Government is to invite the other powers to accede to the Declaration. According to paragraph 2 of the same article, a power which desires to accede shall notify its intention in writing to the British Government and transmit simultaneously the act of accession, which will be deposited in the archives of the said Government. The said Government shall forthwith transmit to all the other powers a duly certified copy of the notification, together with the act of accession, and communicate the date on which such notification was received. The accession shall take effect sixty days after such date. The acceding powers shall in respect to all matters concerning the Declaration be on the same footing as the signatory powers.

the wish that the next Hague Conference might also formulate a code of the laws of maritime war, gives to the remaining states of the international union the best motive for putting off their accession to the London Declaration until the Third Hague Conference, and for making the effort then to bring about a re-examination of the subject-matter of the Convention.[1] The success of this endeavour is all the more to be desired in that the Declaration of London, as is well known, not only leaves open two important questions,[2] but can also be greatly improved in that which it did settle.[3] At any rate it seems to us better, in case the actual rules of the Declaration cannot be re-examined at

[1] Nippold (op. cit., p. 257) is of the same opinion, in contrast to Beckenkamp (*Die Kriegskontrebande in der Behandlung des Instituts für internationales Recht und nach der Londoner Erklärung über das Seekriegsrecht*, Breslau, 1911, p. 108).

[2] Unfortunately an agreement could not be reached upon the question whether the nationality or domicile of the owner should decide the question of the hostile or neutral character of the owner of goods found on board enemy merchant ships, and secondly, upon the question whether the conversion of merchant ships into war-ships may take place upon the high seas.

[3] This is true particularly of the provisions concerning contraband of war, of which von Bar writes : ' It is hard to understand how these reactionary provisions could have come about, so reactionary that we must go back a hundred years to meet with a similar practice which was contested even then.' In view of the extent to which the idea of ' relative contraband ' received legal recognition, this criticism is well justified. Von Bar therefore expresses the hope ' that parliaments in union with public opinion will bring it about that the extremely dangerous strengthening of the law of contraband of war, brought about by the London Naval Conference, rules which threaten the financial ruin of states, themselves at peace, shall not be ratified nor adopted as the general law of maritime war. Rather the formulation of the law of contraband of war undertaken by the large number of states represented at the Hague Conference should be carefully kept before our eyes. See the excellent article by von Bar in the December number of the *Deutsche Revue* of 1909.

the Third Hague Conference,[1] that in accordance with the proposals of the Interparliamentary Union the states not invited to the London Conference should nevertheless accede to the Declaration, than that it should hold good only for a part of the civilized world. And this in the first place for the reason that under the circumstances precise though unjust rules are to be preferred to the situation of complete uncertainty as to the law, and in the second place for the reason that apparently the rules of the Declaration of London will in any case come into force as customary law, even if they should not be expressly adopted by the states not participating in the Conference. The need of fixed rules is so great that in practice the Declaration of London would necessarily become the rule of conduct. We see that best from the fact that at the present moment the powers are already appealing to the Declaration of London in numerous cases arising out of the Tripolitan war, although the Declaration has not yet been ratified by any of the states. Under such circumstances, however, it would be better if the states not invited to the Conference should at least reserve to themselves a formal co-operation in the sense of Article 70 of the Declaration.

But in my opinion there is not the slightest ground for setting aside as worthless the energetic efforts of the Interparliamentary Union to bring about a total codification of international law. This is Zorn's view of the case when he says:

> The proposal for the 'codification of international law' should be promptly and quietly set aside, for no practical

[1] It will not be easy to secure such revision because the Declaration, in accordance with Article 65, constitutes a whole, and consequently an attack upon individual points would bring about the re-opening of the entire problem.

> man can take it seriously. The First Hague Conference did indeed 'codify' certain important points of international law, which, however, were very small ones in comparison with the whole subject; the Second Conference, which remained in session considerably longer, failed to accomplish anything in this respect. And now it is proposed that the Third Conference shall undertake the codification of the entire body of international public law. There is no need of wasting words over these ambitious but visionary plans; for plans which propose impossibilities are of absolutely no use.[1]

This criticism is, in my opinion, much too severe. Certainly the Third Hague Conference could not by itself undertake the codification of the whole body of international law. But the Interparliamentary Union had already proposed in 1906 a permanent consultative council to prepare for this work. If, as a matter of fact, a preparatory committee were to be occupied with the codification of international law during the eight or more years between the Second and Third Conferences, it seems to me that the undertaking would be by no means without prospect of success. The subjects of international law which were codified in a few weeks at the First Hague Conference are in truth not such a small part of international law, but thanks to the preparatory work of the Brussels Conference of 1874 an entire code of the law of war on land was drawn up in that short time.[2] If in the absence of such preparatory work important questions of the law of maritime

[1] Zorn, in the memorial volume to Güterbock, op. cit., p. 236. The same attitude is held by Nippold, op. cit., p. 557 et seq.

[2] In this matter it must also be considered that the chief work of the First Hague Conference did not consist in the codification of existing law, but the Conference found it necessary to create entirely new rules for the Arbitration Convention, as also for the extension of the Geneva Convention to maritime war.

warfare, which it was desired to codify in 1907 at the Second Hague Conference, were left unsettled, yet it seems to me a mistake when Zorn says of this Second Conference that it did not codify any of the subject-matter of international law. It certainly did so. It regulated a large group of important international matters.[1] But if, prescinding from the political difficulties and the absence of preparation, the great number of states and the lack of direction at the Conference made a comprehensive codification impossible, yet the London Conference in the period from December 4, 1908 to February 26, 1909, that is, in less than three months, settled this matter of the law of maritime war in an excellent manner.[2] But he who knows the uncertain ground upon which this work of codification had to be carried out can, in my opinion, have no just doubts that it must be possible in a work of several years to codify all the rest of international law, especially if the preparatory work should be done by a small committee, which might be about the size of the London Naval Conference. It was such a small body as this which the Second Hague Conference provided for in its preparatory committee.

In any case Nippold's assertion that the work of a complete codification of international law can hardly be completed in a whole generation, even if the most prominent international jurists of the entire world were to take part in it,[3]

[1] This is not the place to go into details; rather see the review which Wehberg gives in the introduction to his edition of the texts of the Hague Conventions, p. 33 et seq.

[2] That, in spite of the defects and omissions mentioned above, the Declaration of London taken as a whole is an excellent work will not be reasonably contested by any one.

[3] Nippold, *Die Fortbildung des Verfahrens in völkerrechtlichen Streitigkeiten*, p. 560.

is in my opinion completely answered by the experience we have thus far had of partial codification, and much more so the idea that a codification is in general impracticable.[1] It must be clearly borne in mind that the most difficult part of the task of codification has been already completed. We have already pointed out that, for example, the law of maritime warfare which the London Conference so successfully handled was a very uncertain field of international law. To this we must add above all the fact that the law of war as a whole is pre-eminently political in character. The political power of the state, and with it the outcome of the war, is in this matter always dependent upon the decision of the legal question. The question whether the theory of ' continuous voyage ' shall be applied in its fullest extent, or whether the belligerent may continue to receive supplies of war from neutrals through neutral harbours, can easily determine whether the belligerent can or cannot keep up the war for a longer time.[2] On the other hand, other parts of international law, such as, e.g., the theory of the legal position of ambassadors and consuls, the subject-matter of which is wholly unpolitical in character, could be very easily codified. Moreover, we must remember that as a result of the work of the Institute of International Law we have already on hand the most valuable material for the codification of many fields of law. Finally, apart from the conventions of both Hague Conferences, numerous partial codifications have been made in the treaties of the various international administrative

[1] This view is represented by von Ullmann, op. cit., p. 36.

[2] It is well known that Article 35 of the Declaration of London did away with the theory of the continuous voyage for relative contraband. See upon this whole question the excellent article by von Hansemann, Appendix to vol. iv of Kohler's *Ztschr. für Völkerrecht und Bundesstaatsrecht*, vol. iv, 1910.

unions, which need only to be systematized into a code. We see, then, that a complete codification of international law appears at the present day to be no longer beyond the reach of practical possibility, and when Nippold thinks that the science of international law has thus far neither found nor given expression to such a need, it is only necessary to refer in answer to so celebrated an author as Bluntschli.[1] The complete codification must be carried out only in the proper spirit, i.e., the legislators of international law must not take the haughty attitude that by their positive rules they can give an answer in advance to whatever question of law may arise. Rather, we must leave to science and to the judicial decisions of the international judge the codification of the open questions of international law, which are not yet ripe for settlement. If this method is followed the complete codification of international law will not obstruct the further development of this subject, but on the contrary will furnish a more secure basis for it. And in this case, as has been said,

[1] The first edition of Bluntschli's work, *Das moderne Völkerrecht der zivilisierten Staaten als Rechtsbuch dargestellt*, appeared in 1868, and the third edition in 1878. The book was received with great respect abroad, and a French edition by Lardy, under the title *Le Droit international codifié*, appeared first in 1869, and in a fourth edition in 1886. The book was, moreover, translated into Spanish and Greek, the former translation being by Covarrubias in 1871 ; a Russian edition appeared in 1877, and a Chinese edition in 1880. Besides, Bluntschli's attempt at codification by no means stands alone. I may mention in particular the volume by David Dudley Field, *Draft Outlines of an International Code*, which appeared in 1872, and the work by Pasquale Fiore, *Il diritto internazionale codificato e la sua sanzione giuridica*, which appeared in 1890. The first contains 1,008 articles, and the second 1,340 articles. Finally, the International Law Association has been founded for the special object of the reform and codification of international law. See also Dumas, in *La paix par le droit*, no. 3, 1912, where he treats of the attempts at codification made by Fiore and Internoscia.

a helpful task will be assigned to the international courts in particular.[1]

Accordingly, in opposition to Zorn and Nippold, I cannot but give my support to the plan of a codification of international law after such promising beginnings have been made. To carry out this work part by part, as in the case of the codification of international private law, seems, in spite of the opposition of the interparliamentarians, decidedly the preferable method. The only important point is that a complete codification be the ultimate goal kept in mind. Then the preparatory committee, when it meets two years before the Conference, can on each occasion recommend a larger body of international rules to the coming Conference for codification, while at the same time it can make detailed proposals as to the method of this codification.[2]

[1] Descamps, Lammasch, and Nippold have in particular referred to the significance of the judiciary for the development of international law. See Nippold, op. cit., p. 565 et seq., where he quotes from Lammasch and Descamps.

[2] The French diplomat, Jarousse de Sillac, expresses the same opinion in favour of a complete codification by the gradual codification of separate parts. The subjects which he considers could be codified first of all in this way are : The responsibility of States ; the regulation of diplomatic and consular immunities ; international means of communication ; the execution of judgments against foreign states.

Naturally not only would existing law be codified, but as at the first two Hague Conferences new rules could be framed for the further humanization of war. As examples, Jarousse de Sillac adduces the following : The right of capture at sea (respect for private property) ; the limitation of the blockade of belligerent ports ; the neutrality of certain straits and interoceanic canals ; the effects of war upon treaties and upon private contracts ; the regulation of aerial navigation in time of war. See Jarousse de Sillac, op. cit., pp. 450–54. In addition I might refer in this place to the fact that the legal commission of the pacifists proposed to the Peace Conference at Stockholm in 1910 a complete international code drawn up by Émile Arnaud, which appeared as an appendix to the

The practical Americans have, moreover, found an excellent institution in order to make the work of the preparatory committee as useful as possible. This consists in the establishment of a national preparatory committee. We have already said that the work of the international preparatory committee must be preceded by that of national preparatory committees. The delegates who are to constitute the international preparatory committee must bring with them to The Hague instructions of one kind or another which their home governments have given them. Now it would seem to be urgently desirable that in the preparation of these instructions scholars of the country should at least be given a hearing. If these instructions are furnished by the officials of the foreign office alone, it might easily happen that friction would arise between the members of the preparatory committee at The Hague. For the foreign offices make it their only object to represent the special interests of their respective states. It is quite otherwise with science, which is by its very nature international, and especially the science of international law, which can be regarded in no other way. If diplomacy co-operates with science in the national committee, just as in important matters of national legislation science is called in by the administrative authorities,[1] a compromise between national and international interests can be reached in

Report of the Stockholm Congress, published by J. Bergmann. To be sure, when the proposal is preceded by the statement that, ' The relations between nations are governed by the same legal and moral principles which control the relations between individuals. No nation can make law for itself, no nation has the right to declare war on another,' a long time must pass before this code can come into force.

[1] Consider, for example, the manner in which the Civil Code and the imperial judicial laws which came into force in 1879 were framed, and how at the present day the new Penal Code has been developed.

advance. Naturally the resolutions of the international committee will in turn differ considerably from the instructions which the individual members have received from their own governments. For the international committee can accomplish practical results only by means of compromise. For this reason the work of this international committee should, in accordance with the resolutions of the Second Hague Conference, be ended in sufficient time to allow the programme drawn up by it to be carefully examined in the individual countries. In this examination the national committee will naturally be once more drawn in, and when the question arises how far the individual state can go in adapting itself to the programme of the international preparatory committee, a great influence would again be assigned to the representatives of science, even if the national committee on its part can do no more than offer its mere legal advice.

As has been said, the United States of America have led the way in establishing such a national committee. It was not without reason that the Interparliamentary Union at its meeting at Brussels, in 1910, recommended to the other states that they imitate this example.[1] The resolution was apparently not without effect, for there already exist in France, Sweden, and the Netherlands, preparatory com-

[1] The seventh resolution of the meeting reads as follows :

The sixth Interparliamentary Conference invites all the governments and parliaments here represented to proceed to the creation of national commissions similar to those recently authorized by the Congress of the United States, which commissions shall have the duty of presenting a report to their respective parliaments in view of the meeting of the Third International Conference at The Hague.

The Interparliamentary bureau is entrusted with the duty of presenting this *vœu* officially to all the governments, and the delegates of the conference here assembled are invited to use their personal influence to secure prompt and favourable action upon this subject.

missions of that kind for the Third Hague Conference.[1] It is greatly to be desired that the other states, in particular the German Empire, should follow this example.[2] We call ourselves so readily the classic land of science and the nation of poets and thinkers. Why then should not science in our country obtain the same influence upon international legislation, which it has in other civilized states of the old and of the new world.[3] If this were the case, the change from the attitude of Germany at the Hague Conferences would, in my opinion, be only for good. One cannot in truth assert that Germany has thus far taken a successful part in the work of The Hague.[4] It is certainly better to confess an error than to persist in it obstinately; nevertheless the part played by the leading German delegate, Baron Marschall, who had to confess at the Second Hague Conference that the German Empire had made a mistake in 1899 in its original opposition to the optional world arbitration court, was in my opinion unfortunate enough. Can a state of such culture as ours make a mistake

[1] For the detailed plans of their composition, see *Die Friedenswarte*, xiii, 1911, vol. 12, p. 370.

[2] A resolution of the first World Races Congress, held at London in July, 1911, proposed by the well-known French pacifist, Arnaud, and by myself, has this object in view; it reads as follows:

> The Congress expresses the wish that the governments give themselves without further delay to the study of the questions which should be discussed by the Third Peace Conference, and that they appoint for this object national commissions or one or more international commissions.

[3] Unfortunately such is not the case thus far. In proof, I refer to the fact that the German diplomats at the London Naval Conference were not accompanied by scientific delegates.

[4] It is true that the German delegation, prescinding from the question of arbitration, had a notable share in the proceedings at The Hague. But the question of arbitration constituted the central problem of the whole work!

of such fundamental importance without losing something of the respect in which it is held ? And what will happen when this declaration must be repeated at the Third Hague Conference with respect to the possibility of the obligatory world arbitration treaty with the saving clause ? What will the German delegate say in reply to the reproach that the previous attitude of Germany on this question, as has been said above, has been condemned in the strongest way by all German scholars of international law, with the single exception of Baron von Stengel ? Either he must let the argument hold good against him, or he must, with more or less success, represent the science of his country as wholly inferior in these matters, so that its judgment would be unworthy of consideration. How much more fortunate would be the position of those diplomats who could appeal to the best names of their country in support of their opinion ! [1] But for this it is of prime necessity that the diplomats of our country should keep in close contact with our jurists.

But let us turn from the proposal for a national committee back to the international preparatory committee. We have stated above that at the same time that the Hague Conferences become periodical, this preparatory organ must also be given a periodic character. We see, moreover, how the international union, which has been thus far so greatly neglected by science, is continually obtaining new organs. For at the Third Hague Conference the periodic Conference and the periodic preparatory committee will probably be

[1] I refrain entirely in this work from considering the unfortunate political consequences which the attitude of Germany at The Hague must bring about, and I refer in this connexion only to those results which I have before this pointed out in my *Organisation der Welt*, p. 70 et seq., and which Nippold presents in his book on the Second Hague Peace Conference, vol. i, p. 213 et seq.

associated with the organs for international justice as permanent facts, which is one reason more for earnestly occupying ourselves with the structure of this Hague union. To be sure the Second Hague Conference could not settle one question, namely, the question how the preparatory committee was to be composed. It is well known that a smaller group was thought of instead of the representatives of forty-five states, such as the Conference itself proposed. But how is this smaller group to be composed ? Here we come up against the problem of the legal equality of states, of which we shall speak in greater detail below. In this place we can only express the hope that the powers may succeed in devising a scheme for the composition of the preparatory committee so that this organ, of such value to the international union, may come into practical life.

Section 4. The Regulation of the Voting

The recognition of the fact that the states have come to form an organized union, and indeed, as we assert, a loose federation, will essentially facilitate the solution of another difficult task of the Third Hague Conference. I refer to the establishment of fixed rules concerning the conditions under which a proposal is to be adopted by the Conference. The necessity of a unanimous vote at international congresses is a legacy from the time when the states of the world were not organized. They were then free and untrammelled in their mutual relations, and could only be bound by agreements in the form of a treaty. This is the underlying reason which I find for the unanimous vote previously required at international conferences, not the theory of legal equality. This question has primarily

nothing to do with legal equality.[1] For similarly in an incorporated association the members enjoy by law such legal equality, yet the rule of the majority holds good in such associations of private persons. It is a very interesting fact that from the time that the states began to come into the Hague organization the principle of unanimous vote began to weaken as a practical rule. At the First Hague Conference the principle of unanimity was preserved only for the important conventions; and by contrast the so-called 'declarations' were regarded as resolutions of the Conference, although they were rejected by some states.[2] At the Second Hague Conference the practice was, as Zorn expresses it, 'obscure and inconsistent';[3] we may add, so obscure and inconsistent that we find the statements made by the two delegates Zorn and Huber in direct contradiction. Both agree[4] that the principle of unanimous vote lost its rigour principally because the personal rejection by reservation of vote in the final ballot upon the adoption of the conventions into the Final Act was regarded as irrelevant to the question of unanimity. Moreover, Huber asserts that in the adoption, without consequent obligation, of resolutions in the commissions and in the plenary session, there was a tendency in practice to consider an

[1] It is most unfortunate for the regulation of voting that this problem has been so often confounded with legal equality, as is done in particular by Huber in his very valuable article, 'The Equality of States,' in the memorial volume of legal essays presented to Kohler by foreign writers, Stuttgart, 1909, p. 104. Fried makes the same mistake in his book on the Second Hague Conference, p. 162. But Fried's explanation of the reason why the principle of unanimity was adopted at the earlier international conferences in contrast with those at The Hague is an excellent one.

[2] See Zorn, in the memorial volume to Güterbock, p. 208.

[3] Ibid., p. 209.

[4] See Huber, op. cit., p. 104, and Zorn, op. cit., p. 208.

absolute majority of all the powers represented at the Conference as sufficient, but that in the decisive resolution upon the adoption of the particular convention into the Final Act the principle of unanimity was preserved.[1] Whether at this subsequent plenary session, where the vote was decisive, a state was willing to reduce its rejection of a convention to a mere withholding of its vote, and thereby let the convention be adopted into the Final Act,[2] was, says Huber, a question of political policy for the decision of which the political significance of the state was naturally the determining factor. But this motive is apart from formal law. Each individual state, he says, has reserved its right of veto against the adoption of a resolution in the Final Act by a majority vote.[3] Zorn's explanation is of an entirely different character. Zorn says that at the Second Hague Conference it was agreed that resolutions in which there was 'quasi-unanimity' should be regarded as resolutions of the Conference, without it being possible to determine legally and precisely what constituted 'quasi-unanimity'. The distinction between the two explanations is evident. According to Zorn, a quasi-unanimous vote will overcome a minority opposition, so that a resolution of the

[1] See the detailed statement of the formal procedure in Huber's essay, 'The Development of International Law by the Second Hague Conference,' in the *Jahrbuch des öffentl. Rechtes*, vol. ii, 1908, p. 470 et seq., especially p. 746.

[2] As a rule the rejections of the conventions in the plenary sessions took the form of a mere withholding of votes or the rejection of individual articles; but even in cases where certain states voted 'nay' they did not oppose the adoption of the particular convention into the Final Act.

[3] Huber's actual words are: 'The right of veto is to be regarded as absolute. A restriction of the minority or the examination of the reasons for the veto would not only constitute a formal acceptance of the principle of majority rule, but would directly conflict with the nature of international law.'

plenary session becomes an act of the Conference ; according to Huber, the individual state which is outvoted has an absolute veto, and it is only a question of political policy if it makes no use of it. Which of the two authors is right in his statement of the case ? I think that we can here follow Zorn. In proof of his doctrine of the absolute veto of each individual state, Huber refers to the proceedings in the struggle over obligatory world arbitration. When in this case the majority of thirty-two states, which had expressed themselves in favour of unconditional arbitration for certain cases, sought under the leadership of Martens and Choate to have this convention made binding upon their group, the effort was defeated. A part of the minority, nine states in number, opposed the adoption of this convention into the Final Act, even in the form of a mere annex to the revised Convention for the pacific settlement of international disputes,[1] and the leader of the opposition, Baron Marschall, described this effort as an assault upon the Conference which would endanger the future of the Conferences. Baron Marschall manifestly found a very effective support for his attitude in the fact that the president of the Conference, Nelidow, opposed the steps taken by the first American delegate, Choate, who desired that the majority might carry into effect under the sanction of the Conference the resolutions which it had passed. But these proceedings, however significant they may be, prove nothing against Zorn's doctrine concerning the legal value of ' quasi-unanimity '. For in this single case in which a formal veto was successfully entered against a convention, not less than nine states shared in the veto under the leadership of Germany, as has been

[1] The question was not even allowed to come up before the plenary session. See Huber, *Die Fortbildung*, &c., p. 477.

said, whereas on the other side there was not even a full three-fourths majority of the whole body; so it is not correct to speak of a quasi-unanimity. On the other hand, Zorn's doctrine of the significance of quasi-unanimity would only then be strictly proven if the negative vote of a single or of a few states at the plenary session should later be expressly repeated in the resolution upon the adoption of the particular convention, and yet nevertheless should remain unheeded, or if it should be shown that in the adoption of the act the veto was withheld not from political policy, but on legal grounds. The fact that certain states expressly maintained their opposition against certain articles of this or that convention to the very last session and yet the convention as a whole was adopted in the Final Act, is likewise not convincing.[1] For the plan of 'adoption with a reservation' was developed at the Hague Conferences, so that in the adoption of a convention a state is not bound by those articles with respect to which it has made a reservation.[2] A definite resolution upon the legal effect of quasi-unanimity was naturally not adopted at the Conference. Nevertheless, Zorn's assertion is worthy of belief, that there was a general agreement that resolutions adopted by quasi-unanimity should be regarded as resolutions of the Conference, and Huber cannot deny that the new concept of quasi-unanimity, which he does not mention

[1] Zorn makes this same point with respect to Huber's statements in op. cit., p. 477, note 1; p. 478, note 3; p. 479, note 2; p. 481, note 3; p. 482, note 1.

[2] In this way the larger part of the conventions are crowded with reservations of the most varied kind, made by this state and that. The result is, as Zorn says, 'to create for formal jurisprudence not only a torso, but a confusion of difficult and almost insolvable legal disputes'. See Zorn's preface to Wehberg's edition of the texts of the Hague Peace Conferences, Berlin, 1910.

at all, played a not unimportant rôle at the Second Hague Conference.[1] It was, to be sure, well understood that this idea was an incomplete one, and it was precisely for that reason that the preparatory commission for the Third Hague Conference was assigned the task of proposing an organization and a method of procedure for the Conference.

What shall be our attitude now towards this regulation of the voting? Zorn thinks:

> It is my conviction that in the present state of international law we should hold unconditionally that only resolutions unanimously adopted—to withhold one's vote need perhaps not be taken into account—should be regarded as resolutions of the Conference and be entered upon the proceedings. To admit of majority resolutions would, even if the resolutions of the Conference do not possess legal force, nevertheless in my opinion involve a serious danger for the sovereignty of states, which is the fundamental principle of present international law.[2]

These words remind me of the striking remark of that statesman who used to say: 'I am always in favour of a moderate conservatism.'[3] As Zorn himself tells us, when the Second Hague Conference coined the idea of 'quasi-unanimity' and gave it legal effect in the sense that in the face of it the individual dissenting state no longer

[1] This can be seen from the proceedings of the Conference and from the statements of other delegates; I confine myself here to quoting the Secretary of the Conference, Jarousse de Sillac, op. cit., p. 455.

[2] Zorn, in the memorial volume to Güterbock, p. 210.

[3] The above jest is evidently meant to refer only to Zorn's attitude in this particular question. The author well knows how much the work of The Hague owes to the intelligent and progressive co-operation of Zorn, and how differently the Second Hague Conference would have resulted if Zorn had on that occasion also been a member of the arbitration commission. Moreover, I need only recall in this connexion what I said on p. 77 of this volume concerning the credit due to Zorn for coming to the rescue of the Permanent Arbitration Court.

possesses an absolute veto, the law of unanimity at the Conferences of the international union was abandoned. The wheel of development runs forward and not back; and it would seem to be wholly impossible that the Third Hague Conference should again return to the principle of unanimity. The principle of quasi-unanimity is evidently a slightly veiled transition to the principle of majority rule, and it is by no means evident how the recognition of majority rule is to endanger the sovereignty of states. Zorn himself asserts that under the majority rule not even the state which votes in favour of a resolution will be bound by it, because it still retains the right of ratification; much less would the dissenting state be bound by majority resolutions which have no interest for it; but even if the minority were obliged to recognize resolutions adopted by the majority as binding upon them, the sovereignty of states would not be endangered so long as the subjection to the will of the majority rested merely upon the voluntary obligation of the sovereign state entered into by a treaty subject to denunciation.

Huber also thinks that the principle of majority rule is inconsistent with the nature of international law.[1] But he overlooks the fact to which we have already called attention, that the principles of international law, from the time when they first came to have authority, have never entered upon such changes as in the present, when the transition from the anarchical community to the organized union is being completed. If the civilized world has now established in the Hague Conference a permanent periodic organ for legislation upon its common affairs, it is in keeping with the nature of things that fixed rules should be laid down for such legislation. It is inconceivable that

[1] Huber, *Die Fortbildung*, &c., p. 477.

when the huge body of diplomatic representatives of the entire civilized world has been brought together, and when after proceedings of months in length they have come to an agreement, that the opposition of a single Balkan state, such as Montenegro, or perhaps of another state which has just been adopted into the family of nations from the group of half-civilized states, should obstruct a work of the civilized states as a body. And yet that was the situation which was accepted as law before the Hague Conferences, and which Huber and Zorn would like to retain for the future. Such a *liberum veto* recalls the notorious Polish Diet, and makes impossible any positive work in a political organization, to the injury of all parties.[1] Those who hope for profitable results from the Hague organization cannot protest too strongly against this 'fetish of unanimity',[2] which belongs to a past age. As was told me by a foreign scientific delegate of high standing, soon after his return from The Hague in 1907, it was the prevailing impression at the Conference that in the future the majority must also be protected from the minority, and that with this object in view the Third Conference would begin by regulating the voting so as to make majority resolutions valid.

[1] The situation within the international union is essentially different from the case of an administrative union for a special object, where the assent of the members upon all important questions pertaining to the development of the union can be expected in advance by the very fact of their membership; see the excellent remarks made by Fried concerning the contrast between earlier international conferences and the Conferences of the Hague international union, *Die zweite Haager Konferenz*, p. 162.

[2] This apt expression was coined by La Fontaine, of Belgium, at the Berlin session of the Interparliamentary Union in 1908, where he called upon the Interparliamentary Union in striking language to protest against this principle. See the Report, p. 54. A resolution upon the question of unanimity was, however, not adopted at that time, but this problem, like others, was referred first to the national groups.

Oppenheim also has recently expressed himself to the same effect in the following words:

> Once persons have got rid of the prejudice that the equality of states requires that legislative conferences shall adopt no resolutions which do not rest upon a unanimous vote, there is nothing to prevent successful work being done without unanimity.[1]

I cannot consider the regulation of the voting, as it will be presented to the Third Hague Conference at the beginning of its labours and must be proposed by the preparatory committee, as a specially difficult problem. We must merely take our stand upon the platform which has been adopted by the previous Hague Conferences and carry on the development in close connexion with what has already been done. Accordingly, in the future a distinction must be made between voting in the commissions and the plenary sessions and definitive voting upon the adoption of a given convention into the Final Act. Only an absolute majority of all the states represented at the Conference is necessary for the voting in the commissions and plenary sessions. The adoption of a convention under reservation of certain articles is to be regarded as assent. Should the necessary absolute majority not be had at the plenary session, the proposal in question is definitely abandoned. On the other hand, the adoption of a convention at the plenary session is in no way binding, even upon the states voting in the affirmative. Rather, the conventions remain open until the time they are to be signed, with the object of allowing further examination.[2] Finally, we come to the formal vote whether the convention shall or shall not be

[1] Oppenheim, *Die Zukunft des Völkerrechts*, p. 169.

[2] This also is in accordance with present usage; see Huber, *Die Fortbildung*, &c., p. 476.

adopted into the Final Act. In this vote a distinction is to be made between a mere withholding of one's vote and a formal protest. The votes of those states which have withheld their votes will not be counted. Here also the adoption of a convention under reservation of certain articles is to be regarded as an assent to it. In the face of a formal protest a convention is only to be regarded as adopted when it is supported by at least three-fourths of the states voting. Naturally those states which have entered a formal protest are not bound by the convention adopted, nor are those states legally bound which have withheld their vote. The single innovation which would be found in this regulation of the voting consists in the three-fourths majority as against the inadequate concept of 'quasi-unanimity'.[1] The three-fourths majority in contrast with the simple majority, as has already been proposed, e.g., by Oppenheim,[2] signifies a concession to the existing situation. A majority vote should not be allowed to secure the adoption of a project under the sanction of the Conference, where the majority is a small one dependent too much upon chance. The fact that a trifling minority will no longer in the future be able to obstruct the majority in having its resolutions adopted as acts of the Conference does not signify, prescinding from the principle of quasi-unanimity already adopted at The Hague, such an alteration of the older international law as might appear at first sight. For even according to the earlier law the minority has never been able to prevent the majority from converting

[1] Jarousse de Sillac is also in favour of the three-fourths majority, op. cit., p. 455. Even for states voting in the affirmative the legal obligation would naturally not arise until after ratification, and in this respect the situation remains as before.

[2] Oppenheim, op. cit., p. 32.

its will into fact outside the Conference.[1] In this way the majority would always be able to create for itself those institutions which were defeated at an international conference by reason of the opposition of a minority. Indeed, an attempt to do this was made at the Second Hague Conference with respect to the world arbitration treaty which was defeated by German opposition; for the advocates of this proposal, as a credible informant told me, held two meetings at an hotel to consider whether they should not thereupon conclude the said convention between themselves. The plan did not succeed, and it must be said, indeed, that it would perhaps have been in violation of good faith. For so long as the principle of unanimity or 'quasi-unanimity' holds good at international conferences, the majority lays itself open, in my opinion, to the just reproach of disloyal and therefore, indeed, of illegal conduct, if in the room of an hotel it adopts as a resolution a plan which was defeated in the hall of the conference by the opposition of a sufficient minority. But this objection of a violation of good faith can only be brought so long as the conference is in session. On the other hand, there is nothing to prevent those states whose plan has been defeated at the Hague Conference by reason of the opposition of a minority from subsequently meeting at a new conference and there adopting all those plans which, in consequence of the opposition of the other states, they have thus far not been able to carry through. Accordingly, if the minority must consent to have the convention in question adopted in spite of their opposition, they might as well permit this to be done under the sanction of the

[1] The possibility of this has been repeatedly referred to by others; I mention only the address of La Fontaine at the Berlin session of the Interparliamentary Union in 1908, p. 54.

Conference. To be sure, there is a certain distinction between the two methods, and Zorn rightly says[1] that a resolution which is publicly recognized as the resolution of a peace conference composed of the representatives of all civilized states must always enjoy a particularly high moral value in the eyes of the public. But to prevent the danger that mere majority resolutions of the Peace Conference should be estimated too highly by the public, because they could create the impression of a unanimity which was not present, Zorn himself makes the very wise proposal that in the case of every majority resolution it shall be expressly declared what states have adopted and what states have rejected it.

After the states have once entered into a definite organization, 'the compulsion to create', as the present German Chancellor once so felicitously expressed it, will bring about the necessary reform in the method of voting.[2] And when a large majority is no longer prevented from having its proposals adopted as resolutions of the Conference, the establishment of new agencies of organization for the civilized world will be greatly facilitated, and in the end these agencies will, in the majority of cases, prove to the advantage of the dissenting states as well. For Fried[3] rightly says that it is a matter of experience that no international institution has at the start won the assent of all states, but rather that all international unions, for instance the Universal Postal Union, the Geneva Convention, &c., were first adopted by a small body of states, which in the

[1] Memorial volume to Laband, p. 209.

[2] Nippold's idea (*Die zweite Haager Friedenskonferenz*, part ii, p. 255), that we must unconditionally hold fast to the principle of at least a greater approach to unanimity, seems to me impossible from the purely juristic reason that this quasi-unanimity is a very vague concept.

[3] Fried, *Die zweite Haager Konferenz*, p. 164.

course of years, after the advantages of their organization had become known, were gradually joined by the other states. This possibility must be allowed for in the work of the Hague Conferences as well. On the other hand, there is no danger that the fact that majority resolutions have the force of law will result in the aggrandizement of the great powers. For the dissenting states are in no way bound, and the practical realization of a resolution would be wholly useless without the co-operation of the majority of the great powers. For this reason a majority of the second- and third-rate states will be inclined to make very far-reaching concessions in order to obtain the co-operation of the powerful states.[1]

We have shown above that the sovereignty of individual states would not in any way be endangered if, in accordance with a treaty subject to denunciation, the resolutions of a majority of the states of the federation were to be adopted under a rule that the minority should be legally bound by the majority. Nor would such a proceeding be inconsistent with the nature of the international union as a world federation.[2] For the doctrine that in federations resolutions must be passed by unanimous vote, and that the principle of majority rule can only be applied by an exception in matters of secondary importance, is in any case false. In the meantime, as far as one can see, this provision will never be adopted in the Hague conventions. For good reasons the great powers will always refuse to subject themselves to mere majority resolutions of The

[1] This opinion is held also by Huber in his treatise on the Equality of States, op. cit., p. 109.

[2] See Jellinek's *Lehre von den Staatenverbindungen*, p. 176, concerning the possibility that in a federation the individual state adopts in advance the will of the majority as its own.

Hague. The great powers cannot let themselves be bound by a resolution of the small states. Under such a plan one could apply to Germany the danger referred to in an historical document which, thank God, has never become public, namely, the danger of an ' ochlocracy of the smaller states '. The preliminary condition for such a rule would always be that the principle of equality should first have been set aside and that each world power should have at the Conference precisely that influence which would correspond with its standard of culture. But this problem of determining an apportionment of votes at The Hague on the basis of the standing of the states, and of setting aside the principle of the equality of states, is much too difficult to admit of its adoption in the near future. For this reason there has thus far been scarcely any discussion of a gradation among the states in their co-operation in the work of international legislation.[1] If the principle of the equality of states, which had its origin in the age of disorganization, were to be set aside at the present day, the world federation would be broken up, to the injury of civilization. For this reason we stated in the introduction to this section that it would be well not to connect the question of voting with the problem of legal equality. Nevertheless this problem deserves to be separately examined with reference to other questions.

[1] This is also pointed out by Huber in his treatise on the Equality of States, p. 109. It was only after the defeat of the Judicial Arbitration Court at the Second Hague Conference that the principle of equality found critics, especially in the United States and Great Britain; see the article by Hicks in the *American Journal of International Law*, vol. 2, p. 530 et seq.: ' The Equality of States and the Hague Conferences '; also Lawrence, *International Problems and Hague Conferences*, 1908, pp. 23, 74, 143, 144, 148.

Section 5. The Legal Equality of States [1]

As has been repeatedly said, the Judicial Arbitration Court was blocked only by the difficulty of composing it, because the great powers claimed for themselves a permanent place upon it, while the other states were only to be represented upon it in groups under a system of rotation, for which there was no sufficient justification.[2] All of the states except the great powers declared this system of rotation unacceptable, because they saw in it an attack upon the principle of legal equality. After this unfortunate experience no attempt was made at the time to organize the preparatory committee for the Third Peace Conference, because it was said that the question of equality would in this case also have brought the proceedings to a standstill. Two important institutions, upon whose usefulness to the welfare of the international union all were agreed at the Conference, can only come into existence when this difficulty has been removed. Strangely enough, this obstacle was overcome in the case of the Prize Court. Here the great powers have a permanent seat upon the court, whereas the other states are represented, according to a system of rotation, for a larger or smaller fraction only of the full official period. What the smaller powers allowed to pass in the case of the Prize Court they successfully protested against in the case of the Judicial Arbitration Court. What is the explanation of this inconsistency? Huber, a delegate to the Conference, gives us the following

[1] Huber deserves the credit of having thrown great light upon this question in his special study, already frequently quoted: *Die Gleichheit der Staaten*, memorial volume to Kohler.

[2] Huber gives a precise exposition of the proceedings of the Second Hague Conference upon this subject, op. cit., p. 91 et seq.

interesting explanation:[1] the second- and third-rate maritime powers, and in particular the landlocked states, would have had no advantage from the present system of exclusively national prize jurisdiction. But the erection of an international prize court involved, he says, an important restriction upon the autonomy of those states which are practically the only ones which take prizes, namely, the great powers, particularly the great maritime powers. But in the case of the Judicial Arbitration Court there were no real advantages for the smaller powers to counterbalance the doubtful consequences of an organization favouring the great powers. The Judicial Arbitration Court would not have involved special obligations for or conferred special advantages upon either the great powers or the other states, but it would have been a setback to the smaller powers in their claim to equality without any substantial reason to justify it. These are indeed considerations of utility, and it seems to me very doubtful whether they are justified. There cannot be the slightest doubt that the smaller states must reap the greatest advantage from a development of the international judicial organization. So long as peace is not unconditionally secured within the international community, the existence of the second- and third-rate states is more or less precarious. In the last instance it often rests merely upon the rivalry of the great powers. But this obstacle to the annexation of the smaller states may one day be removed through diplomatic alliances. What would have become of Belgium and Luxemburg, if Bismarck, after he had more or less attained his aims in Germany in 1866, had not taken a determined stand against Napoleon the Third? The Swiss writer, Huber, is also perfectly clear upon this point,

[1] Op. cit., p. 95.

and shows us that there would have been a disposition to make concessions with respect to legal equality, if the Second Hague Conference had secured for the smaller states the advantage of having the stronger states placed under an obligation to yield in the future to the demand of a weaker state for the legal settlement of a dispute. In the meantime one who is as well acquainted as Huber with the present stage of the development of international life must be fully aware that a truly obligatory jurisdiction for disputes between states can be only the coping of the whole building, and that it cannot be laid at the present moment. Is it therefore politically wise or practically expedient for the smaller states to obstruct the further construction of the building under whose sheltering roof they will one day dwell in a security unlooked for at present? Of what value to them is their formal legal equality, with its most logical inferences, so long as their right to existence and their independence is not secure? How much better would they act in their own interest, if they were to make every sacrifice for the further development of the international union, since, as we shall show later on, the natural consequence of the federal development will be a constitutional permanence of the present relations of the states!

It is true, indeed, that the mere adoption of the Prize Court Convention on the part of the majority of the smaller states cannot be interpreted to mean that these states have abandoned the doctrine of legal equality in the strict sense of the term.[1] It is also true that the present theory and

[1] A whole group of states only adopted the convention under reservation of Article 15 regulating the composition of the court. It is not clear from this whether the reservation is to signify merely a guarding against further encroachments upon the principle of equality or whether Article 15

practice of international law have recognized the principle of legal equality, even within the international administrative unions.[1] But on the other hand it is also true that this principle of legal equality, as has been said above, comes down from the period of national disorganization, and that in theory and practice the first steps towards its overthrow were taken when the endeavour was made to get away in principle from this condition of disorganization. There is to my knowledge no author who has proposed an international organization of Europe or of the whole civilized world, and who has at the same time held to the principle of the absolute legal equality of states.[2] And when, as a matter of fact, after the wretched conditions of the Napoleonic period the pentarchy of the great powers endeavoured to take measures to secure the peace of Europe, the other states were simply placed under guardianship, as it were, when there was question merely of political and not of legal measures.[3] The question therefore comes to this: at what stage of international law are we to-day? Is the absolute legal equality of states, even with respect to their share in the agencies of organization, consistent with the present status of international law? Before we answer this question let us state that Huber also justifies

is to be rejected. In addition, a large number of states expressly declared at the plenary session of the First Commission, on September 10, 1907, that in adopting the convention they did not mean to abandon the principle of equality in the strict sense.

[1] In my opinion we must concede to Huber the credit of having presented this proof in his thorough exposition of the subject, p. 97 et seq. On this point I am also of his opinion that the classification of states in the international administrative unions with respect to contributions to general expenses does not signify a deviation from the principle of equality.

[2] See the projects for organization in my treatise, *Die Organisation der Welt*, and the authors quoted by Huber, p. 105.

[3] Huber, p. 101 et seq.

a gradation in the share of the states in the agencies of organization in the international community, if the stage of international development desired by revolutionary pacifism were attained, namely, that the international community should have advanced to a commonwealth.[1] Since in a commonwealth an opposition between the commonwealth and the individual will is possible, in the very nature of things, he says, the commonwealth seeks to attain such a form as will put it in a position to assert itself against the individual will. In all unions of states we see that the further the jurisdiction of the union extends and the greater on that account is the possibility of a conflict between the common and the individual will, the more the organization exercises the power where the need arises to do so. But when Huber further says: 'that there is no doubt whatever that the so-called community of states, the body of states recognizing international law, cannot be considered as a commonwealth, unless it is desired to assign to the community of the great powers a control over the other states', he is, in my opinion, mistaken. In the preceding discussions I believe that I have succeeded in proving that the hitherto purely social community of states has begun to develop into an organized international union. There is nothing to prevent this union from being described as a commonwealth, so long as it is kept in mind that the existence of this commonwealth rests upon the will of the parties to it, as expressed in a treaty subject to denunciation at any time, and thus does not constitute a new legal authority but merely a new legal relationship. In proof of his idea Huber refers to the Prize Court and to the Judicial Arbitration Court, and thinks that these institutions are, or rather would be, organs merely of unions of

[1] Huber, op. cit., p. 116.

the old kind, which could not be considered as commonwealths. But in so doing he overlooks completely the fact that these institutions were regarded as organs not of a new special union, but of the entire Hague international union. We have, we think, shown in the preceding pages that those courts are to act in the name of the Hague international union, just as we have in the German Empire an imperial postal administration, in which not quite all the states are represented. And when Huber, in proof of his idea, says that 'the International Prize Court does not act as an organ of the whole body of states which are parties to the Convention, but merely as a court for the states which have rights and obligations in each individual case'[1] he is entirely wrong.

It cannot be emphasized too often that the Prize Court has been created as an organ of the international union and is to decide in the name of the whole union, even if it has received its general commission only from those states which have concluded this Convention. Even in the case of the Permanent Court of Arbitration we must assert that t is regarded as an organ of the international union, in whose name it is to decide cases, even though the commission to decide them must in the individual case be granted by the states which are parties to it. The international courts are therefore organs of the international union, and the fact that, e.g., the Prize Court, although possessing jurisdiction only with respect to the states which are parties to the convention in question, acts as an organ of the whole union although only thirty-three states have signed the said convention,[2] proves that we have here

[1] Op. cit., p. 113.

[2] In choosing the number thirty-three I follow Jarousse de Sillac, op. cit., p. 466, as against the figures given by others. Thus Wehberg, in his

already that conflict between the will of the international union, the common will, and the individual will, which is characteristic of political associations of states. In objection to this inference Huber will say that the minority could have formally protested against the Prize Court, and that the subordination of the individual will to the will of the union was even then only a voluntary one in the individual case. Quite right, but what of the legal significance which was ascribed at the Second Hague Conference to 'quasi-unanimity', upon which Huber is wholly silent? Is not the subordination of the individual will to the will of the union evident here? And will it not be even more evident if the principle of 'quasi-unanimity' is replaced by the principle that a fixed majority can compel the adoption by the conference of its resolutions? When that point is reached the only memory of the earlier legal status of the purely social and unorganized community of states will be the relative obligation assumed, i.e., the fact that the states which are out-voted need not take part in the execution of the resolutions. At any rate, however, it would then be possible for the first time for the community of states to create entirely new institutions for itself, in spite of the formal protest of certain of its members. A conflict between the will of the community and the individual will is therefore already possible at the present day under the principle of 'quasi-unanimity', and this possibility will become greater and greater with the adoption of fixed principles regulating the voting. Things are in a state of transition, and an organization of the community of states is in the making—an organization which, according to Huber's own doctrine, must take into account the location of authority.

edition of the texts of the Hague Conventions, op. cit., p. 154, counts only thirty-one states.

Finally, the following point must also be taken into consideration: it is true that within the anarchical community of states neither theory nor practice laid down the legal principle that the great powers could impose their will in international affairs upon the second- and third-rate states, yet at the same time a sort of political hegemony was exercised by the great powers.[1] When, then, an international union of states shall be organized, it is quite intelligible and consistent with the whole historical development that the leading states should be unwilling to stand upon a platform of absolute equality in all and each of their relations with the other states. Naturally the bow should not be bent too far, and that would undoubtedly be the case if, e.g., the great powers were at the present day to claim a special influence in the creation of substantive rules, but that has thus far not been done. In the future also, as has been said above, the traditional rule of legal equality will be strictly adhered to within the international union in the casting of votes. But that is in itself a great concession which will be made to the smaller states in accordance with their former right, in order not to demand of them upon their entry into the international organization a *capitis diminutio maxima*. But where there is question of creating entirely new agencies of organization for the whole community, it seems to me not unjust that the legal influence of the individual states in the said organization should be graded according to their actual importance. In all other respects it is customary for the

[1] Huber himself must concede (op. cit., p. 100) that occasionally the great powers assumed a precedence over the other states which was not very consistent with the recognition of the equality of the other states; see also on this point, with reference to Greece, the article by Streit, 'The Great Powers and International Law,' in the *Revue de droit international et de législation comparée*, 2nd series, vol. ii, p. 5 et seq.

law to follow the facts, and the smaller states must concede that the actual importance of every international institution for the individual states which make use of it differs greatly according to the part played by the state in international life.

It seems to me, therefore, that the smaller states might accept the *capitis diminutio minima* which is involved in the unequal and graded share assigned to them with respect to international institutions, if within the international union itself legal equality is further conceded to them, and especially to those states which, as has been shown above, will reap in the end the greatest advantage from the international organization as a whole. On the other hand, the great powers will do well to facilitate as far as possible for the other states the transition to the new conditions. Now this can easily be done if, in place of the absolute equality which is claimed in principle, a relative equality be substituted.[1] On this point we think as follows: the great states will not merely claim a position of preference in the new international institutions by reason of their political leadership, but an endeavour will be made to discover a standard according to which a classification can be made of all the members of the international union, which will then naturally be to the corresponding advantage of the great powers. There are other reasons also for preferring this plan. Huber rightly says:

> The composition of this political community is exposed not only to constant and gradual changes, but at times

[1] Huber repeatedly speaks in favour of this plan, e.g., p. 107. At the Second Hague Conference the principle of absolute equality was represented, in particular by Brazil through its delegate, Barbosa. That was the case in Committee *B* at the sessions of August 17, 20, and 27, September 5 and 18, and at the session of the committee of examination of the subcommission on August 17 and 22, and at the plenary session of the First Commission on September 10.

> to sudden ones. For those great powers which at the present day are deficient in the necessary birth-rate, and which lack opportunities for territorial expansion, the system of a preferential legal position of the great powers might be fatal within a single century.[1]

It would be necessary, therefore, to find an objective test, based upon the purpose of the given institution, of the actual interest which the individual states would have in the institution, so that this varied interest could then be made the basis of the legal influence of the state in the institution. In this respect it seems to me that the British proposal with respect to the composition of the Prize Court met the situation. According to this proposal the court was for the time being to have a fixed composition for a definite period, and its judges were to be appointed only by those states whose merchant marine amounted to at least 800,000 tons.[2] It is true that a rule of this kind would have been to a certain extent an arbitrary one.[3] But, after all, the relations of actual life can never be wholly brought under abstract rules, and in a certain sense every legal principle contains an element of arbitrariness. That is due to the imperfection of all earthly things, which must be particularly manifested in the new and still so changeable field of international organization. And when Huber further says: 'an agreement upon the basis of the gradation can never be obtained in the case of general institutions, such as the Judicial Arbitration Court is to be,'[3]

[1] Huber, op. cit., p. 117.

[2] See ibid., p. 91. Under this plan Norway would have obtained a permanent seat upon the court, while certain great powers would have been unrepresented.

[3] Huber asserts (ibid., p. 107) that stronger objections must be raised against such an arbitrary standard for relative equality than against the abandonment of absolute equality.

he is, in my opinion, wrong. In this case the population of a state must be simply taken as the standard.[1] Is not the interest of a world power of sixty-five million citizens in a new and truly permanent international court much greater than that of a small state of four million inhabitants? This suggestion was, indeed, made at the Second Hague Conference, and it was intended for some time to classify the states simply according to population, and after thus placing them in higher and lower classes to assign to them a representation upon the court for a larger or smaller fraction of the full period of office. The states with the largest population would have had a judge, e.g., for ten years, states of the second class one for eight years, &c., down to two years and one year.[2] And Huber himself tells us that in spite of the opposition of several states this composition of the court was regarded as on the whole an acceptable solution. In my opinion it is sincerely to be regretted that this distribution of the judges in groups should have been set aside, and that the objective test of classification was replaced by a subjective one, in which the great powers as such claimed a permanent representation upon the court and the other states were brought together in various groups according to a standard which was recognized as arbitrary, because it was subject to no rule and also because no reasons were given in justification

[1] Naturally this principle could not be followed to its logical consequences. Otherwise the Chinese nation, with its four hundred millions, which has but recently been taken into the family of nations, would overwhelm all of the great powers of Europe.

[2] The discussion of this project took place, to be sure, only in the beginning outside the commissions and committees. See Huber, op. cit., p. 92. In such a composition of the court, states such as China, Turkey, and the Netherlands (because of its colonies) would have been placed in the first class beside the eight great powers, which in my opinion would not have been an international misfortune.

of it. To be sure we cannot entertain for all institutions such a gradation of co-operation, based upon population, which is expressed in the period during which the representative of a given state holds office. For example, as regards the composition of the preparatory committee for the Third Hague Conference, I consider that the number of the members of this committee should only be as great as the number of the judges of the Prize Court or of the Judicial Arbitration Court. Now the members of this committee must unquestionably meet together at the same time, in order that profitable work may be done. At the same time we can also consider with respect to the preparatory committee a composition which is based upon the population of the several states. We need only create electoral districts for the representatives of the states, so arranged that each great power will by itself constitute an electoral district, while a number of more or less homogeneous states, which together have the required number of citizens, will be grouped into a single electoral district. In this latter case the members of the group must agree upon a common representative, while the electoral districts composed of only one state appoint their representative directly.[1]

We see, therefore, that even in respect to the legal equality of states it is possible from time to time to make compromises, and it is to be desired and hoped that in the future greater use will be made of this possibility than was the case at the Second Hague Conference. The first British delegate has already threatened in the British *Blue Book* that, in view of the claim of the second- and third-rate

[1] I am here following a plan which was first proposed by the delegates at The Hague for the composition of a truly permanent court of justice. See Huber, op. cit., p. 92.

states to an equal share in international institutions, the great powers would be led to act by themselves, that is, to reach an agreement within their own narrower circle.[1] This threat has already been carried out at the London Naval Conference with respect to a special subject, the codification of the laws of maritime warfare. Only Germany, the United States, Austria-Hungary, France, Spain, Italy, Japan, Holland, and Russia took part in the Conference, and the other states were simply not invited. And the result of this action is, as was shown above, that it is very doubtful at the present day whether the subsequent co-operation of the states not invited will not have more of a formal character than otherwise. It is true that it would give rise to difficulties if the great powers by themselves sought to give to their group a sufficiently definite organization,[2] whereas on the other hand the

[1] Miscellaneous, no. 1, 1908, p. 21 : ' The claim of many of the smaller states to equality as regards not only their independence, but their share in all international institutions, waived by most of them in the case of the Prize Court, but successfully asserted in the case of the proposed new arbitral court, is one which may produce great difficulties and may perhaps drive the greater powers to act in many cases by themselves.' Likewise the French *Yellow Book* upon the Conference expresses, on p. 60, its dissatisfaction in the following terms : ' A project for an international court, discussed at a great Conference where forty-four powers had each a vote, could not obtain the necessary unanimity except on condition of taking into account not only the interests but the susceptibilities of all parties. It is true that no one demanded the application pure and simple of the principle of the equality of states, but no more was too marked an inequality acceptable.'

[2] Huber (op. cit., p. 117) calls attention to this, and points out that dominating tendencies would then make themselves manifest within the group of the great powers themselves, just as France, Russia, England, and Germany have by turns sought and succeeded in playing a leading rôle within the concert of Europe. As a matter of fact there are almost as great actual differences between the great powers themselves as between the great powers on the one hand and the smaller states on the other.

smaller states could form the connecting link between the great powers in the organization of the civilized world, just as Bismarck used to say that the smaller states formed the connecting link between the members of the German Empire. For this reason the great powers, as has been said above, should come forward as far as possible to meet the second- and third-rate states on the basis of the old law by the recognition of a relative equality. On the other hand the smaller states might subordinate their sensibilities to the needs of international life. For after the experience of the Second Hague Conference I see no possibility that the needs of the day can be satisfied under the doctrine of absolute equality.

Section 6. The Constitution of the Hague International Union

In the preceding pages we have seen that the states which took part in the Hague Conferences already constitute an international union, which can be classified in a legal way only as a loose federation. It will be the task of the Third Hague Conference to create a fundamental law, a constitution for this world federation.[1] It is not

[1] Oppenheim also desires a constitution for the international community, *Die Zukunft des Völkerrechts*, p. 23. Moreover, this is the place to make honourable mention of a man, recently deceased, who was the first of our contemporaries to take up in a very intelligent and thorough way the study of the problem of a 'constitutional treaty between the states' and of an 'international union'. We refer to the former advocate of the Imperial Supreme Court of Commerce, Eugen Schlief (born 1851, at Guben), and his notable work, *Der Friede in Europa*, which appeared in 1892 at Leipzig. To be sure, the book did not produce directly such an effect as would have been consistent with its intrinsic worth. That was due to the peculiar position which Schlief adopted in his generation. He stood between two schools. He was far in advance of the professional

enough that the preparatory committee should, in accord ance with the injunction of the Second Hague Conference,

science of international law of his time, and the bitter words which he writes in the preface of his book concerning the professional representatives of that branch of science, namely, that they had forgotten that it was not the part of their profession to indulge under all circumstances in a sophistic embellishment of existing conditions, but that it was their duty to work for the improvement of those conditions, are, in my opinion, thoroughly justified. But the science of international law was naturally very far from allowing new paths to be pointed out to it by this wholly unknown attorney, and it took no notice of his book. On the other side stood the pacifists of the old school. The work of more than 500 pages, written in a very heavy style, was much too scholarly to find a wide reception among them. Moreover, it breathed that spirit of legal organization which was wholly foreign to the older pacifism. The result was that Schlief stood far too aloof from the pacifists to make common cause with them in their work, and to carry out his ideas by patient labour in daily intercourse with them. He was unwilling to co-operate even with the Union for International Understanding, founded in 1911, and, manifestly embittered, he ridiculed not only the organized peace movement, but also the work of the Interparliamentary Union and the Hague Conferences. All that was due to the fact that men would not immediately adopt his plan of a constitutional treaty between the states and of an international union. In so doing he completely failed to recognize that the organization created by the Hague Conferences contained in itself the beginnings of that international union which was precisely what he wanted. Nevertheless the work done by him for the cause of pacifism was not in vain. It is well known that he greatly influenced Fried, who, in the first edition of his *Handbuch der Friedensbewegung* (p. 91 et seq.), gives an excellent selection from Schlief's doctrines ; and if Fried can claim for himself the merit of having created in Germany the sympathy between pacifism and the science of international law, a part of this success must be put down directly to Schlief, the value of whose ideas was appreciated by Fried much sooner than by the professional scientists. If in addition we recall how well Fried has succeeded in promulgating the ideas of organized pacifism in his books, as well as in the *Friedenswarte*, now in its fourteenth year, and in enriching them by his own ideas, his merit in the eyes of pacifism is none the less great. Somehow there have always been precursors who have at bottom influenced every bearer of new ideas. With what striking clearness Schlief foresaw the development of things is best evident from the fact that in his book, published in 1892,

propose an organization and a method of procedure for the Conference; but as the Conference itself is an organ of the international union which stands behind it, it is of prime necessity that this union have its fundamental law, in which the rules for the organization of the Conference will then naturally find their place. Only the fact that jurisprudence has thus far not rightly estimated the significance of the work of The Hague for the organization of the nations can explain why the Second Hague Conference was satisfied with entrusting to the preparatory committee merely the organization of the Conference as such. But this Conference is itself, as has been said, merely an organ of the international union upon which it depends; for this international union, as we have shown in our investigation, has in addition a whole group of other organs: the Permanent Court of Arbitration, the International Bureau, the Administrative Council, as well as the Prize Court and the Judicial Arbitration Court,[1] to which

he showed and predicted that the first impulse towards the organization of the international community must come from Russia, which, as is well known, actually happened in the year 1898, to the surprise of all the world. Other details of his international programme will be spoken of below. In this place we may only call attention to a smaller writing in which Schlief brought together his political-pacifistic ideas under the title *Hohe Politik*, under the pseudonym B. O. T. Schafter (2nd ed., Berlin, 1902), and also to the interesting necrology of Schlief, which appeared in the second part of the *Friedenswarte*, 1912, from the pen of A. H. Fried. Another interesting precursor of scientific pacifism, namely, the Swede, Gustav Björklund (born 1846, died 1903), whose work has remained almost unknown in Germany, has been the subject of an article by Ellen Key in the same number of the *Friedenswarte*.

[1] As has been said above, the establishment of the Judicial Arbitration Court, to which Zorn and Nippold are so strongly opposed, appears to be all the more assured in that the commission appointed by the Institute of International Law to consider the work of the Third Hague Conference has expressed itself in favour of this court; see the report presented by

can be added the international commissions of inquiry, as extraordinary organs of the international community acting from time to time.[1] Whether persons agree with us in regarding the international union as a loose federation, or whether, on the other hand, a wholly unpolitical character is assigned to it and it is placed upon a plane with the international administration unions, such as the Universal Postal Union, still all those administrative unions have as their basis a similar international treaty, which is the foundation of the whole and contains the fundamental law of the union. It appears, accordingly, to be the most urgent task of the preparatory commission of the Third Hague Conference to draw up such a treaty, which will make known to the world what has actually thus far been accomplished at The Hague, and which will make public the fact which has been set forth clearly in the preceding pages, that all of the institutions thus far established and proposed at The Hague are brought into a close legal connexion by the fact that they rest upon an international union of the civilized world, created implicitly and *ipso facto* in 1899.

And this statute of the Hague international union, which the Third Hague Conference should, and it is to be hoped will give us, would be in the last instance nothing more than the ' basic treaty ' so greatly desired by the pacifists.

Rolin upon the work of this commission in the *Revue de droit international*, 1911, nos. 5 and 6.

[1] In proof of the doctrine advanced by us above, on p. 114 et seq., that the international commissions of inquiry are to be regarded as organs of the Hague international union, we may in this place again call attention to the fact that, in accordance with Article 18, no. 2, of the Convention relative to the Judicial Arbitration Court, the delegation of this new court is competent to act as a commission of inquiry by the joint accord of the parties.

Even if a more modest result were to be obtained, even if nothing more should be done than merely to declare what has already been attained in the way of the organization of the Hague international union, the day on which this statute shall be adopted will be the great day of triumph for pacifism. The last moral blow will then properly have been struck; and whatever happens after that will be merely the death struggle of its enemies! The Arbitration Convention of 1899 has been happily called the Magna Charta for the organization of the civilized world;[1] the future history of the world will in my opinion justify this belief; but we need a new instrument which by its very terms will make it clear to our contemporaries what has been actually accomplished. For how few have thus far understood that in the Arbitration Convention we have actually the foundation of a new international union of the civilized states with a political object, and therefore a world federation!

It seems to me accordingly, as I have said, that organized pacifism, which is unknown in its true aims to the great multitude of people and to the majority of scholars, and which is on that very account suspected, opposed, and regarded as unpatriotic, is at the present day already on the eve of its decisive victory. It is only necessary that all forces be centred on this point, and that the partisans of this movement in all countries shall take as their own the plan advocated by us and propagate it with all energy: to make clear what has been already done, in recognition of the fact that the civilized world has formed itself into an international union, for which the periodic Conferences are to be only the most important organ. So important is the development of this inter-

[1] See above, p. 38 et seq.

national union that we can be satisfied if the Third Hague Conference merely condescends to recognize in a statute of the Hague international union what the actual situation is. This statute must, accordingly, be so drawn up that its adoption even by the states which oppose it will appear merely as a logical consequence of their previous co-operation in the work of The Hague. It must not be encumbered with fundamental changes of any kind in the life of the states; the states represented at the Hague Conference shall merely acknowledge honestly what has already been done. This recognition is to be embodied in a statute of the international union, which would then be an argument of immeasurable force for the efforts of constructive pacifism.

May we hope that the Third Hague Conference will fulfil this demand? I think so. We have already [1] quoted an expression of the Swiss scholar, Huber, a delegate to the Conference, that the Conventions relative to the Prize Court and the Judicial Arbitration Court were built up upon the basis of modern revolutionary, as I call it, *organized* pacifism; and we have at the same time on the ground of this statement asserted the fact that in that case the majority of the Second Hague Conference, knowingly or unknowingly, must have stood upon this basis. This fact offers the best of prospects, for there is no doubt that the pacifist movement, once placed upon a firm basis, will succeed in spite of, or perhaps precisely because of, the unfortunate incidents within the international community. For these incidents are suited in the highest degree to enlighten all intelligent persons upon the unsatisfactory state of present international relations. But even if the majority of the states at the Hague Conference shall take an attitude of aloofness and opposition to the ideas of

[1] See above, p. 9, note 1.

organized pacifism, why should they not nevertheless condescend so far as to codify in a statute the legal relations of the international union which has already been created? If the further aims of the pacifists are indeed as Utopian as their opponents believe, the statute of the Hague union will not be drawn up after pacifist ideas, and the situation in the civilized world will remain as unsatisfactory as it is at present. The mere fact that the states at the Hague Conference should regulate the existing relations of their union in a statute will not bring about perpetual peace, if in reality the peace of the civilized world under the security of law is the foolish dream ridiculed by the militarists and the nationalists. It would, therefore, only be a question of including such provisions in this statute as would make it appear to be merely the expression of existing law, including those rules which the proposed statute of the Conference must contain, and which we have discussed in the preceding pages. The said statute would then be a sort of federal act. In this federal act there would be brought together the most important provisions relating to the organization of the union as a whole, while the rules relating to individual institutions, such as are contained in the existing conventions, would remain in force as appendices to the federal act. In like manner the conventions for the codification of substantive international law, e.g., those relating to land and maritime warfare, would constitute an appendix to the federal act. But it is only proper that this collected legal material of the conventions should be rearranged from the point of view of the law of procedure, which has reference to the institutions and their effectiveness, and of the substantive law. The federal act itself must, in my opinion, contain the following provisions:

Introduction: The sovereign states of the civilized world, convinced of the advantages which would result from their permanent union for the maintenance of peace and the promotion of civilization, have agreed to unite into a permanent federation, and for this purpose have provided their ambassadors of the Third Hague Peace Conference with full powers, to wit . . .

In accordance with this resolution the foregoing ambassadors, after exchanging their full powers found in good and due form, have concluded the following articles:

Article I. The sovereign states of the civilized world, to wit: . . .[1] unite into a permanent federation which

[1] Here follows the enumeration of the forty-five states which were represented at the Second Hague Conference. Costa Rica, which remained away from the Second Hague Conference, will be associated with them the next time. The only question which can give rise to difficulty is whether Persia has not been excluded from the Hague international union, since it appears to have lost its *de facto* sovereignty; see on this point, p. 90, note 1. On the other hand, the recent events of the revolution in China can only strengthen its position in the world federation, since they signify the modernizing and Europeanizing of that country. As soon as the domestic difficulties which are naturally involved in the change which has come about have been overcome, China will demand full membership within the community of sovereign states in every respect. See on this subject the valuable article of the Roosevelt Professor, Paul Reinsch, 'The New China and the Nations,' in pt. 3 of the *Friedenswarte* of 1912, p. 86 et seq.

It may be mentioned that the entrance of the Far East into the organized international union was not foreseen even by Schlief. As the title of his book, *Der Friede in Europa*, indicates, he intended to limit his association of states to Europe, and in so doing to exclude even Turkey. He thereby repeats an error which Bluntschli committed in his work, published in 1878, upon the organization of the European association of states, and which is often committed by pacifists at the present day, as is illustrated in the efforts of Prince Cassano. On the contrary, in my *Organisation der Welt*, p. 64, I have pointed out already that the leading states of Europe have far too many interests outside of Europe to make it possible to bring about a federation in Europe without at the same time organizing the world. Naturally this does not prevent a separate European union after the pattern of the Pan American Union; but it will always have

shall be called the Hague International Union. The union is entered into under reservation of the sovereignty of the members and of all rights flowing from it, in particular of the right of each individual member, under observance of the forms provided for in Article 18, to withdraw from the federation.

Remarks on Article I. The drafting of the statute offers the opportunity of doing something which has thus far been neglected, namely, of coining a name for the new organization.[1] It has been said above that this was neglected in the year 1899, and that while every international administrative union, no matter how relatively subordinate its object is, has its appropriate name, the organization of The Hague came into the world unnamed. Perhaps in view of the many people in Germany whose attitude is one of timidity where questions of internationalism are concerned, and who were in no way sympathetic towards the Second Hague Conference in 1907, it is better that this was the case. But the more the organization of the international union progresses the more urgent it becomes to find a name for this organization, which already has become in its collective capacity the subject of property rights and duties.[2] The legal and appropriate

an entirely subordinate position with respect to the world federation. Concerning the international union of Europe, see the article by A. H. Fried in the *Friedenswarte*, 1912, p. 81.

[1] This idea is also advanced in an address of the Dutch jurist, Vollenhoven, upon the work of the Third Hague Conference, according to a report in the *Revue générale de droit international public*, 1911, vol. xviii, p. 242. See the same author in the *Revue de droit international*, 1911, no. 3.

[2] The judges of the Prize Court are to receive their pay not from the individual state, but from the International Bureau, which receives it from the Administrative Council. The international union here appears as the party owing the debt. Should a dispute arise as to its amount the judges can take an appeal against this union, represented indeed by the International Administrative Council and not by the Bureau, as

technical term which we have applied thus far in public law and in international law to political organizations of that kind within the community of states is, as has been shown above, the term *Staatenbund* — a federation of states. The union of states could be, from a legal point of view, appropriately described by no other term than a federation of the states of the world. If the work of The Hague were christened with this name it would be an argument of great significance. The single term 'federation of states' is a clear political programme pointing to international solidarity, and it would exercise a tremendous psychological effect upon millions of persons who have no suspicion at all of the details of the judicial organization at The Hague, and would essentially contribute to creating the indispensable psychological foundations for the complete development of the community of states in the sense of a progressive international organization and an extension of the dominion of law. It is true, however, that precisely in this political programme which is expressed in the word 'federation' lies its weakness. For we must reckon with

von Liszt thinks (*Das Wesen*, &c., p. 14). The question raised by von Liszt, before what court and in accordance with what law the appeals should be taken, is readily answered by the fact that the Dutch courts are considered as competent and the Dutch law as applicable to the case, because The Hague is the seat of the organization, and therefore the domicile of the debtor, and is in addition the place of the performance of the contract, where the creditor can enforce his claim. On the other hand, the international union might appear as plaintiff when the case relates, for example, to its property, the documents possibly of the International Bureau. The international union considered as a federation is not in any true sense a legal subject of public and private law, but we may concede to it, as being a sort of 'international association having joint ownership' (Jellinek, *Allgem. Staatslehre*, p. 699), active and passive standing in court. In his address, referred to in the preceding note, Vollenhoven has pointed out the necessity of regulating anew, at the Third Hague Conference, the property relations of the international union.

the fact that the powers of The Hague have reached no agreement upon this political programme, and those which have thus far regarded the work of The Hague with a certain mistrust will have their fears intensified. Prescinding from the fact that the nationalists of all nations will raise a great outcry against a world federation, there is also the political danger that by calling the organization a federation legal conclusions may be at times deduced which would not be consistent with the facts and would only lead to unfortunate dissensions. These political dangers which are involved in the word 'federation' are all the greater because, as was shown above, the concept of a federation is one of the most disputed terms of international law, and many authors consider that a federation has a legal personality, of the existence of which there can evidently be no question in the present case. For the present, therefore, it is better to choose for the organization a name which will be as colourless as possible. In this respect it seems to me that it would be best to choose the word 'union' [*verband*], since it signifies nothing more than the presence of an organized community, the existence of which can no longer be denied. The corresponding word in the French text would be simply '*union*'. Accordingly in the French text the expression '*Union des États de La Haye*' would be employed. The designation of this international union as that of The Hague would give a definite character to the union and distinguish it sufficiently from other international special unions.[1] Further, it is well to point out, as has

[1] The problem of the name to be given to the organization of states in the basic treaty has already been considered by Schlief, op. cit., p. 276 et seq. He also advocates the view that, legally considered, the international union is a federation, but he nevertheless rejects this term for political reasons, in consideration of the fact that in the case of previous federations a gradual process of consolidation has always taken place,

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been done in the first article, that entrance into the federal body does not involve the *capitis diminutio* of a limitation of sovereignty, and that on this account each state must retain the right, under the observance of certain forms, to withdraw from the union.[1]

which will give rise to mistrust. He rightly rejects the term 'United States', which in the abstract would be appropriate, but which is too closely associated with the United States of America, which are now in fact a federation. The result is that Schlief arrives at the wholly colourless expression '*Staatensystem*' [organization of states]. This term, he says, clearly expresses that we are not dealing with a voluntary institution, adopted merely from reasons of expediency, but with a necessity of the state of affairs postulated by the present development of civilization. It seems to me first of all that Schlief has read too much into this word, and when he further calls attention to the fact that the expression '*Staatensystem*' had already been made use of by the community of states he fails to perceive that much less was intended then than he calls for in his basic treaty. We recall, for example, the idea which Bismarck's professor of history at Göttingen, Professor Heeren, associated with this word in his *Geschichte des europäischen Staatensystems und seiner Kolonien*, which appeared first in 1807. The term '*Staatensystem*' is, in my opinion, not sufficiently juristic, and is entirely unsuited to expressing the transition from the anarchical to the organized association of states. Accordingly, the term '*union*' deserves the preference, because it has already been adopted by the organized unions for specific administrative purposes. I am not in agreement with Vollenhoven (op. cit.) upon the term '*Union juridique mondiale pour le maintien de la paix*', because this reference to a mere judicial organization seems to me too narrow. Accordingly the fittest term seems to me, as has been said above, the expression '*Union des États de La Haye*'.

[1] We may compare the corresponding provision in the Vienna Final Act of May 15, 1820, Article 5 of which reads: 'The federation is founded as an indissoluble union, and in consequence none of its members has the right to withdraw from it.' From this comparison it is seen how much looser this federal body is than was that of the old German Confederation. Instead of the express right of denunciation on the part of the members of the union, Schlief proposed in his book that the basic treaty as a whole should be concluded only for a fixed period; it seems to me, however, that the permanence of the object of the union is better expressed by the first plan of a treaty, the duration of which is not fixed.

Article II. The object of the union is to secure, as far as possible, peace between the states by the establishment of an international judicial system, to codify and develop international law, to obtain legal protection for individuals in matters of international law, and to establish organized international administrative institutions.

Remarks on Article II. In setting forth the object of the union we must put the maintenance of peace as its first task. That alone corresponds to the historical formation of the union which, as we have shown above, was implicitly created by the Hague Peace Conference. In speaking of securing peace between the states *as far as possible*, it is meant that the states of the union do not in any way intend to renounce the right to carry on war, as was the case in Article II of the Vienna Federal Act.[1] On the other hand, the oldest institutions of the union, namely, the Permanent Court at The Hague and the international commissions of inquiry, come under this heading of the maintenance of peace. The codification and development of international law have, moreover, occupied the Hague Conferences from the beginning and will also occupy them in the future, as has been expressed above. This task can therefore be regarded as a permanent object of the whole institution. Further, the Second Hague Conference has put the legal protection of individuals in matters of international law upon its programme to the extent of giving

[1] Paragraph 4 of this article reads as follows: 'The members of the confederation likewise agree not to make war upon one another upon any pretext, nor to settle their disputes by force, but to bring them up before the Federal Diet. It then becomes the duty of the Diet to endeavour to reach a settlement by a committee, and in case this committee fails and a legal decision becomes necessary, the Diet must bring about such a decision by a suitable court, to whose award the contending parties must thereupon submit.' See also Articles 19 and 21 of the Vienna Final Act.

the Prize Court jurisdiction over claims of private persons against a foreign captor state. We have shown in another place how far this principle may be extended by giving a similar legal protection to the individual in other affairs of an international character, whether they involve claims against a foreign state, or the interpretation of rules of codified international private law by the highest courts of a state, or the compulsory execution of foreign judgments. Accordingly, the legal protection of individuals in matters of a juristic character relating to international law appears to be a permanent object of the international union. Finally, it also appears suitable to take into consideration from the start the establishment of organized administrative institutions in the interest of the union. As is well known, there is no such provision in the German Act of Confederation in spite of the fact that the federal bond was in that case much closer;[1] and the German Confederation was, as a matter of fact, restricted to that notorious 'rôle of night-watchman', to which, in the struggle against federal domination, it was sought for a long time to restrict in theory the welfare of the individual states.[2] But prescinding from the fact that this abandonment of any positive duty of providing for the common welfare brought the Federation from the start into discredit with the citizens of the member states, the international community of states has long since outgrown the situation which prevailed in the German Confederation from 1815 to 1866.

[1] Compare Article 2 of the German Act of Confederation of June 18, 1815, which reads as follows: 'The object of this Confederation is to secure the peace of Germany both within and without, as well as the independence and inviolability of the individual states.'

[2] See in particular the celebrated work of Wilhelm von Humboldt, *Ideen zu einem Versuche, die Grenzen der Wirksamkeit des Staates zu bestimmen.*

In those international administrative unions, of which we have spoken earlier in this work, we already possess organized institutions for administrative purposes within the international community, only they do not appear precisely as juristic agencies of the Hague international union. I have already pointed out in another place that these special administrative unions sooner or later must be absorbed by the world federation, just as the German Zollverein was absorbed into the present German Empire; and that it would be an unnecessary waste of time, energy, and money if, in spite of the presence of an international union with common objects, in the future a new union of states should be founded for each new international administrative purpose.[1] The example of the Prize Court shows us, indeed, that it is possible to establish new agencies of organization even without the co-operation of the whole body of the states of the international union. Following this example, international administrative agencies in the interest of the union can be created in the future also, without it being necessary that all the states of the Hague union take part in them, and it seems fit that

[1] See my work, *Die Organisation der Welt*, p. 80. The idea there expressed by me for the first time in the German literature of international law, that the organization of The Hague would ultimately 'absorb' the other existing international unions, is in the act of being fulfilled at present. I refer to the project of an international permanent bureau which would occupy the same position with regard to the world federation which the Pan American and Central American Bureaux occupy for a limited group of states. The proposal in question is discussed in great detail in the *Revue générale*, 1911, no. 2, and the actual provisions are there set forth. It has been turned over to the American Government with the request that it be placed upon the order of business of the Third Hague Conference. The world bureau here proposed, apart from other duties, is to occupy a central position with regard to all existing international unions and superintend their activities.

the statute of the union should allow freedom in this respect.

Article III. The international union is a community of sovereign and independent states with equal rights and duties of a contractual character.

Remarks on Article III. It seems appropriate here again to characterize the international union as a community of independent states (see Article I), so that no new legal authority is established which dominates over the individual states. The association thus appears as a purely contractual one, and the above article also recognizes as permanently valid the principle of legal equality, which has thus far prevailed in international law.

Article IV. The highest organ of the international union is the Hague Peace Conference, in which all members of the union are represented by their plenipotentiaries. Each member has one vote in the Conference. If a state is represented by more than one delegate the right to vote must be entrusted to one of them.

Remarks on Article IV. The Hague Peace Conference would, *mutatis mutandis*, play the same rôle within the world federation as was played by the Frankfort Diet of the old German Confederation. The fact that each state in this case has only the one vote, and that several second- and third-rate states are not grouped together and given one vote, is in keeping with the principle of legal equality, which for the present must be preserved if any agreement is to be reached. The custom of sending several delegates to the Peace Conferences, one of whom is given the power of voting, will properly be retained.

Article V. The Peace Conference meets every ten years at The Hague in regular session, beginning as a rule

on the eighteenth of May. The invitations will be sent out a suitable time in advance by the Dutch Minister of Foreign Affairs, as president of the International Administrative Council. At the request of a simple majority of the states which are members of the union, notification of which must be sent to the International Administrative Council, an extraordinary session must be called.

Remarks on Article V. It has been said in another place that for the present a ten-year period between the Peace Conferences is to be recommended, and that The Hague is the only locality which can be considered as the meeting-place of the Conference (see above section 2, p. 182 et seq.). After the example of numerous constitutions of individual states regulating the sessions of their parliaments, it seems proper to fix an approximate date for the periodic sessions of the Peace Conference. In my opinion the eighteenth of May suggests itself as the most appropriate date, because it is the memorable day on which the First Hague Peace Conference began its sessions. In order to make the recurrence of the Conferences as automatic as possible, the plan recommends itself, as has already been said in another place, of entrusting the formal summoning of the Conference to an organ of the international union, namely, the International Administrative Council, represented by its president, the Dutch Minister of Foreign Affairs. In order to prevent inconveniences which might occasionally arise from the long period during which the Conference is not in session, extraordinary sessions of the Conference are provided for.

Article VI. The Peace Conference has power to legislate:

1. Upon the affairs of the international judicial system;
2. Upon the codification and development of international law;

3. Upon institutions for the legal protection of individuals in matters of international law;
4. Upon the organized agencies of international administration;
5. Upon amendments to the constitution of the international union;
6. Upon the procedure of the Peace Conference;
7. Upon the finances of the international union.

Each state represented at the Conference has the right to be heard before the Conference, to make proposals and to offer motions, which the president must refer to the assembly.

Resolutions which involve an amendment to the constitution can only be passed by unanimous vote. In other cases a majority vote decides; nevertheless the minority can effectually protest against the execution of all resolutions which are not adopted by at least a three-fourths majority of the states voting. States not voting are not counted. Even where there is a three-fourths majority, the dissenting states are nevertheless not bound by the resolutions of the majority, and in particular the obligations of those agencies of organization to which they have not given their approval cannot be imposed upon them. The same holds good when, in the absence of a three-fourths majority, a formal protest might have been made, but was not made. Only the procedure of the Conference can be modified by a three-fourths majority with binding effect upon the whole body.

When an affair which is not common to the whole international union is being voted upon, only the votes of those states shall be counted which have an interest in the affair, unless the said conventions provide otherwise.

Remarks on Article VI. It seems first of all proper to define precisely the jurisdiction of the Hague Peace Conferences, otherwise there would be danger that certain purely political affairs, e.g., the so-called Alsace-Lorraine question, might suddenly be brought up before this forum.

It is not sufficient that a state be protected in affairs of that sort by a majority vote ; it must be protected from having the Conference take a hand in any way in such purely political affairs which involve the relations of one state to another. This is necessary, to be sure, in order to preserve the character of the Peace Conferences as international law conferences. The jurisdiction of the Peace Conferences, mentioned in Nos. 1 to 4 of paragraph 1 of the above Article VI, is directly deduced from the object of the international union, as set forth in Article II. The authority to introduce amendments into the constitution will not be denied to the Peace Conference, for the need arises from time to time in every organization to alter its fundamental law ; and no other organ could be competent to do so except the highest organ of the union, the Peace Conference at The Hague. The precaution must be taken, however, lest by a subsequent amendment of the constitution of the international union the whole organization should be given a different character against the will of individual members. For otherwise there is either no prospect of the adoption of the constitution, because individual states will fear this danger and refuse to enter into the union, or as soon as this danger becomes actual the states will subsequently make use of their right of withdrawal and the whole organization will break apart. For this reason paragraph 1, no. 5, of this article enumerates amendments to the constitution of the international union as coming under the jurisdiction of the Peace Conferences, but at the same time paragraph 3 of the same article provides that a unanimous vote at the Conference is necessary to carry such amendments. This provision also held good for the old German Confederation, where the federal bond was closer.[1]

[1] See Article 13, no. 1, of the Vienna Final Act.

The jurisdiction given to the Peace Conference under nos. 6 and 7 of the first paragraph of this article presents little that is worthy of remark. The need of an organization and method of procedure, as was said above, was sufficiently understood at the Second Hague Conference and the preparatory committee was assigned the task of making proposals in that respect. The Conference naturally reserved to itself the right to pass finally upon this subject, and because of the importance which the organization and method of procedure may have the Conference will not surrender the right to decide upon later modifications of this instrument. Finally, the Conference, as the highest organ of the international union, must secure for itself the right to take measures regulating the finances of the international union.

Paragraph 2 of Article VI formulates the acknowledged right of every state which is represented at the Conference to obtain a hearing for its opinions and proposals, and the corresponding duty of the president to present all motions of the several states for discussion and to put them to a vote.[1] The equal position of all the states in this respect is a direct inference from the structure of the whole union, which rests upon the principle of legal equality. It is true that the Imperial Constitution of the present German Confederation, adopted April 16, 1871, does not confer upon the president as such a special right to offer motions before the Bundesrat, although highly important political authority has in other respects been conferred upon that office. To be sure, in this instance a special right on the part of the president of offering motions in affairs of imperial administration has developed as a matter of custom. But as in accordance with the constitution of the international union

[1] See Article 8, paragraph 2, of the German Imperial Constitution.

of The Hague none of the states is likely to hold the presidency permanently, the question of a special right on the part of the president as such to offer motions before the Peace Conference can hardly arise in this case.

The provisions concerning the adoption of resolutions at the Hague Conference follow next in Article VI, and they are among the most important of the whole constitution. In this connexion it has already been said that unanimity is indispensable in resolutions providing for modifications of the constitution of the international union. Moreover, paragraph 3 of Article VI gives expression to the principles developed above in section 4 (p. 209) with respect to voting. The principle laid down in the old German Confederation that unanimity was also necessary for the establishment of new institutions for the fulfilment of the ends of the Confederation,[1] has, as we know, fortunately been abandoned by the Second Hague Conference, just as the development of substantive international law at The Hague was from the very beginning not made dependent upon the fact that the states as a body had given their approval to the new principle. It seems proper, therefore, that in all affairs which do not relate to the constitution of the union a majority vote should, as a rule, be held decisive. The minority appears to be sufficiently protected by the provision that first of all it is given a right of formal protest against such resolutions as are not passed by at least a three-fourths majority, and that in the second place the minority, even if this right prove inadequate, is not bound by majority resolutions, and in particular it need not contribute to the expenses of institutions to which it has not given its approval. An exception must be made,

[1] See also Article 5 of the Vienna Federal Act, and Article 13 of the Vienna Final Act.

however, to this relative obligation in the case of the rules of procedure. These rules also may require to be modified. Their importance is not so great that unanimity should be necessary in such case. On the other hand a modification of the rules of procedure, which would have effect only for the states approving it, is evidently not to be considered. For the same rules of procedure must necessarily hold good for the entire Conference. In this respect, therefore, the minority must yield to a three-fourths majority.

The last paragraph of Article VI is intended to regulate resolutions of the Conference in such affairs as are not common to the whole international union. We have shown above in the case of the International Prize Court that it is an institution of the entire international union, although it is called into operation only for the smaller group of those states which have concluded the Prize Court Convention. Such cases will often arise again when the Hague international union further develops. In particular we spoke above of the possibility that new institutions of a purely administrative character would henceforth no longer be created by special unions established *ad hoc*, and that the Hague international union would regulate such affairs for itself, even in cases where only a part of the states of the Hague union should co-operate in establishing them. In all such cases, however, it would seem to be conceded that only those states which have a direct interest in the given affair should as a rule vote upon the adoption of the said institutions and questions.[1] On the other hand all these affairs, since they are conducted in the name of the Hague union, directly affect the interests of those states also which belong merely to the larger union. It seems proper, therefore, to leave it possible that the

[1] See paragraph 4 of Article 27 of German Imperial Constitution.

affairs of the smaller group might in this or that respect be brought before the Conference as a body. The normal way of doing this would seem to be by the adoption of a provision to that effect in the given convention. Moreover, the voting within the smaller group must naturally be regulated by rules drawn up in the separate convention for that object, and only ultimately by the rules regulating the voting in plenary session.

> Article VII. The questions of the presidency of the Conference, of the procedure to be followed in the discussions of the Conference, and the number of the commissions and their composition are regulated by a code of procedure, which in its first form must be adopted by unanimous vote. Concerning modifications of the code of procedure, see Article VI, paragraph 3.

Remarks on Article VII. In my opinion, it seems wise that the rules relating to the constitution of the international union and the rules relating to procedure should be set forth in separate documents, so as to give a greater elasticity to the rules of procedure by making it unnecessary to have the same unanimity in modifying them as appears to be necessary for modifications of the constitution of the union. That it is not desirable that the president of the Conference should be determined by lot has already been said in another place.[1] The simplest solution of the question of the presidency is that the Peace Conference should always be opened by the Dutch Minister of Foreign Affairs, because the Conference meets upon Dutch territory, and because, as we have proposed,[2] the Dutch Minister is president of the International Administrative Council, and as such sends out the invitations to the Peace Conference. But when the Conference has once met it is proper that,

[1] See above, p. 189, note 1.

[2] See Article 5 of the statute.

as in other political gatherings, the permanent president should be chosen by the Conference as a whole, in order that the person best qualified may be appointed to that important office. Moreover, it seems advisable that the code of procedure should provide for a group of regular commissions, which will in consequence be constituted by each Conference at the beginning of its proceedings,[1] and with which other extraordinary commissions could be associated at need. The most important question for the composition of the commissions is whether the selection of members shall be turned over to the states which are to be represented on the commission, so that the states can then appoint from among the number of their representatives the person who is actually to take part in the work of the commissions,[2] or whether the Peace Conference shall have the right to appoint certain persons upon the commissions, who must of course always be taken from among the special delegates, although it is not necessary that the person chosen be the particular one empowered to vote. The

[1] These commissions would be analogous to the permanent committees of the Bundesrat ; see Article 8 of the German Imperial Constitution.

[2] This is the method now followed for the constitution of the committees of the German Bundesrat. It is in fact not in keeping with the Imperial Constitution, for the terms of Article 8 of the Constitution are that ' The *members* of the (other) committees shall be chosen by the Bundesrat '. The present practice rests upon a resolution of the Bundesrat adopted in 1872 (Protocol, sec. 87), which was incorporated into the rules of procedure. This resolution says that the states represented upon the committee shall appoint the members of the committee from among their plenipotentiaries or the deputies representing the latter (*Rev. Geschäftsordnung*, sec. 18, par. 3). That this method is inconsistent with the terms of the Imperial Constitution has rightly been asserted by Laband, Binding, and Hänel ; see the literature on the subject in Laband, *Reichsstaatsrecht*, 4th ed., vol. 1, p. 263. It must be assumed, however, that this alteration of the Imperial Constitution by the rules of procedure, inadmissible on its face, has by custom come to be valid.

first way will be preferred by the individual state looking to its own special interests, because it will give it a greater political influence in the result of the proceedings; but the second way will be more in the interest of beneficial work on the part of the Conference. The Conference as a body will place its confidence in certain persons, whether because of their work as international law jurists, or because of their labours at previous Conferences, or their practical diplomatic ability, and it will naturally desire that these persons co-operate upon the given commission. But if, instead of this plan, by a sort of indirect appointment the states are chosen who are then to appoint their representatives upon the commissions, and if these representatives can appoint as their deputies other persons than those whom the said states wished to have represent them, or if the individual states can prevent successful work on the part of their representative upon the commission by the abrupt exercise of a *ius variandi* through the appointment upon the commission of other persons from among the delegates, such acts could only be hurtful to the proceedings. It seems proper, therefore, to follow the method of choosing the members of the commissions directly. The proper influence of the home government is secured by the fact that the final voting is done in the plenary session, where the delegate empowered to vote can act in accordance with its instructions. But if the chief delegate should have reason to fear that the delegate from his country has, as a member of a commission, diverged too far from the views of his government, there would remain as a last resort the right to recall the said person from the delegation, the result of which would be of course to annul his position upon the commission. The plan of having all members of the commissions appointed directly by the Conference

as a body would also help best to avoid the difficulty that, if the states themselves appointed the members of the commissions, the great powers would probably demand that they be given a permanent representation upon the permanent committees.[1] But this would bring up again the difficult problem of the legal equality of states. This difficulty will be avoided if the commissions are composed, not of states, but of individual delegates. It would then be left to the diplomatic tact of the Conference to see to it that the leading states should nevertheless be represented upon the commissions by a member of their delegation, and it would be expected that in this way the great powers would have sufficient direct influence in the commissions. For the labours of the commissions would be more or less useless, unless the assent of the leading states were secured in advance by this method. The other questions of procedure appear to me to be more or less of a technical nature. In answering them we need above all things the practical experience which has been obtained at previous Conferences, and this is unfortunately not at our disposal. For this reason we refrain from laying down more detailed provisions in this respect. This much may, however, be said, that the above proposal that the code of procedure in its first form should be adopted unanimously is based on the consideration that even rules of procedure may contain certain provisions of a political bearing, e.g., the question whether states or individual persons shall be appointed upon the commissions. According to the exist-

[1] If each of the great powers were to be assigned a permanent position upon the commissions, it would carry out further the analogy between the commissions and the separate committees of the German Bundesrat, in which certain states are represented in accordance with a constitutional provision; see Article 8, paragraphs 2 and 3, of the Imperial Constitution.

ing practice a quasi-unanimity would here be necessary. If individual states should lay stress upon the fact that those provisions which are more political than technical in character should be made as permanent as possible, such provisions could be transferred from the rules of procedure into the constitution of the Hague union.

> Article VIII. The resolutions of the Hague Conferences come into force after and in so far as they have been ratified by the member states. On the other hand the member states are permanently obligated to carry out in good faith the resolutions ratified by them.[1]

Remarks on Article VIII. The fact that the relations between the states of the union are based upon international law makes it proper that the resolutions of the Hague Conferences should not become binding until ratified. The question whether and in how far those states which are chiefly affected by a resolution (see Article VI) are under an obligation to ratify the said resolution can for the present be settled in accordance with the general rules of international law. It would, in my opinion, only create difficulties if we were to seek to create at present fixed rules in this respect, which might seem to the states to place unwelcome fetters upon their action. Naturally this does not prevent the subsequent adoption of fixed rules for this question also, when international law further develops, and that, e.g., an international court should have jurisdiction to decide upon request whether the ratification was refused in a wholly arbitrary way, and therefore whether it should not be brought about by a legal decision of the international court. If the individual states were to subject themselves to such jurisdiction under the

[1] Oppenheim (op. cit., p. 24) makes the same proposal.

constitution of the Hague union in the form of a denunciable treaty, there would be no reason to see in such submission a diminution of their sovereignty. The further express obligation, entered into by members of the union in Article VIII, to carry out in good faith the resolutions ratified by them is merely in accordance with the existing law.

> Article IX. The current business of the international union will be performed by the Administrative Council of the Permanent Court of Arbitration (see Article 49 of the Convention for the pacific settlement of international disputes), which in the performance of its duties may make use of the services of the Bureau of the Permanent Court. The Administrative Council will be in particular the legal representative of the international union; it is sufficient to bind the international union that a document be signed by the president, or his deputy, and two of its members. The Administrative Council presents to the member states each year a report upon the entire administrative work done by it.

Remarks on Article IX. As we have shown above, the powers represented at the Hague Conferences already regard the Administrative Council of the Permanent Court as their organ for all current business.[1] It is only natural that, with the development of the work of the international union beyond the mere functions of the Permanent Court of Arbitration, this organ of the union should also possess a jurisdiction beyond that connected with the Arbitration Court. As the Administrative Council, which, as is well known, consists of the diplomats accredited by the states to The Hague under the presidency of the Dutch Minister of Foreign Affairs, has in its turn need of a bureau for the administration of its business, it seems natural that the Bureau of the Permanent Court of Arbitration, which is

[1] See above, p. 117.

already at hand, should be made use of.[1] Our proposal is likewise merely in keeping with the fact that the Second Hague Conference has already extended this Bureau to the proposed judicial court. In addition to current business the Administrative Council would have charge of the formal preparation of the Peace Conferences, i.e., the determination of the dates on which they are to be held, the programme of procedure, the provisions for local arrangements, the bureau of the Conference, &c. As has been said in Article V, the Administrative Council, represented by its president, would also have the duty of sending out the invitations to the Conference. Although, as we have earlier pointed out, there is no inclination on the part of the powers to extend the jurisdiction of the Administrative Council beyond the mere formal administration of business,[2] yet there was a general agreement that the Administrative Council should be the legal representative of the international union. The international union, as being a sort of international corporation, is of itself a subject of rights and duties at private law, and consequently

[1] In this way the Bureau of the Permanent Court of Arbitration will gradually develop of itself into that general International Bureau which we have elsewhere advocated; see above, p. 150, note 1. Article 4 of that project also subjects the world bureau which it advocates to a *Conseil directeur*, which is to be composed of the diplomats at The Hague under the presidency of the Dutch Minister of Foreign Affairs, and which would therefore coincide with the Administrative Council of the Permanent Court of Arbitration.

[2] This is overlooked in the project of the general International Bureau where the Bureau is, by Article 2, no. 3, assigned the task 'of doing all in its power to maintain the peace and to assure a pacific solution of the international questions and disputes which may arise between the signatories of the convention'. That would be a strictly political function which the powers are, for the present, not inclined to entrust to the Administrative Council, not to mention the world bureau dependent upon it.

there must be an organ to represent the international union in this respect.[1] This organ can, in accordance with the present structure of the international union, be no other than the Administrative Council at The Hague. This organ must e. g. be regarded as competent to demand of a third party the delivery of property of the union, e. g., its archives, and on the other hand claims for the payment of salaries, &c., could be brought by employees of the union against this organ.[2] It seems proper that a further precise provision should be laid down stating what forms are necessary when the Administrative Council assumes obligations of private law toward third parties in the name of the international union. The requirement that this shall be done in a written document which shall be signed by the president of the council, or his deputy,[3] and by two other members, seems to me to offer the necessary guarantees in favour of the international union, and on the other hand to do away with unnecessary formalities. The special duties of the Administrative Council in the field of the administration of the finances of the international union could be defined more in detail in another place. The duty of the Council to make a yearly report to the members of the union upon its entire administrative work is merely a natural extension

[1] See above, p. 244, note 2.

[2] That in such a suit the courts of The Hague would have jurisdiction and that the Dutch law would be applied is likewise pointed out in the passage above referred to.

[3] The further the jurisdiction of the Administrative Council extends the more necessary it appears that a deputy be at hand in the enforced absence of the president, a provision not contained in Article 49 of the Convention for the pacific settlement of international disputes. In Article 4 of the above-mentioned project for the general International Bureau there is a not inappropriate provision that the dean of the diplomatic corps for the time being shall be *ex officio* deputy president of the Administrative Council.

of the duty assigned it in Article 49 of the Convention for the pacific settlement of international disputes.

> Article X. Two years before the meeting of each Conference a preparatory committee shall enter upon its duties.
>
> The duties of this committee shall consist:
>
> 1. In collecting the various proposals to be submitted to the Conference;
>
> 2. In ascertaining what subjects are ripe for embodiment in an international regulation;
>
> 3. In preparing a programme which the powers should decide upon a sufficient time in advance to enable it to be carefully examined by the countries interested.
>
> The committee shall consist of fifteen members and five deputy members; the latter may be admitted to the discussions with a deliberative voice. The members of the committee shall be chosen by the states of the union in accordance with an electoral law which shall constitute a constituent part of the code of procedure of the Conference. Each of the great powers shall constitute by itself an electoral district, whereas the second- and third-rate states shall be grouped into separate electoral districts in accordance with the size of their population. The preparatory committee shall elect its deputy members after it has come into session.

Remarks on Article X. It has been explained elsewhere that the Hague Peace Conferences require a separate organ for the preparation of the substantive work to be done by them.[1] This organ cannot be established by the Peace Conference itself, because the interim between the Conferences is too great, and when one Conference breaks up it cannot be seen what forces will be at the disposal of the states for the preparation of the work of the next Conference. In order to fulfil its task the committee must be composed of experts in the theory and practice of inter-

[1] See above, p. 189 et seq.

national law, and there would be, as has been said above, too little unity if all the states of the union were represented upon it. A selection is therefore necessary. In making this selection, however, two questions arise. In the first place how many members shall form the committee, and in the second place how shall they be selected ?

The question of the number of the members of the preparatory committee is one of pure expediency. On the one hand, the number must be sufficiently large so that in addition to the representatives of the great powers, who for intrinsic reasons must be regularly represented upon the committee, a number of distinguished persons can be appointed to the committee from among the second- and third-rate states. On the other hand, the committee must not have so many members as to be unable to fulfil its tasks from lack of union. In our opinion, therefore, it seems that fifteen members is the proper number to compose the committee. As it is possible that during the long period before the committee actually meets, and before its proceedings come to an end, certain persons might drop out, it should be provided that from the beginning, in addition to the regular members, five deputy members be elected who may be called in by the Administrative Council in the order of their election to fill the places left vacant. It seems proper, however, that the deputy members themselves should, if the committee so approve, be invited from the start, either as a body or in part, to be present at the discussions, in order that they may be, so to speak, already in touch with the course of the proceedings, in case they are called upon to take a formal part in them. For the time being, however, they would be limited to a merely deliberative voice. It would devolve upon the Administrative Council to summon them to become fully empowered

members in case a vacancy should arise, because the Administrative Council, being an organ for the current business of the international union, has also to provide that the preparatory committee meet at the proper time and be composed of the proper number of members. The Administrative Council would therefore be called upon to regulate the elections for the preparatory committee.

But who shall be appointed to the committee ? As has been pointed out in another connexion, the simplest method would be to divide the members of the international union into as many electoral districts as shall correspond with the regular number of members of the preparatory committee. In mapping out these electoral districts a number of more or less homogeneous states, whose combined populations reach a fixed number, must be grouped together. Each of the leading states must of itself constitute a district. For otherwise it might happen that one or other of the great powers not represented upon the preparatory committee might reject the results of the proceedings and thus defeat the work of the committee. To be sure, the recognition of the great states as constituting electoral districts by themselves and the grouping of the second- and third-rate states into separate districts would actually involve a preference of the great powers, which would not be consistent with the traditional principle of absolute legal equality ; but we have heard above that this principle can simply no longer be reconciled at all times with the needs of a progressive international organization, and that it has already been abandoned in the composition of the Prize Court. On the other hand, this apportionment of the members of the preparatory committee seems at least to secure to some extent the principle of relative equality, both with respect to the relations of

the second- and third-rate states with one another and with respect to their relations with the great powers. For the number of states to be grouped into an electoral district is to be made dependent upon the size of their population, so that the influence of states with large populations upon the election would be greater by reason of the fact that under certain circumstances they would constitute an electoral district with only a few other states. Moreover, the preference shown to the great powers over the second- and third-rate states is also justified by the fact that each of them possesses as large a population as a whole group of smaller states. The details would have to be regulated by an electoral law, which, in view of the well-known rivalries of the states, will be a difficult matter to frame. This electoral law, being a constituent part of the rules of procedure, as is provided in Article VI, paragraph 3, must be in its first form unanimously adopted, but it can be later modified by a three-fourths majority. Such a modification would be required if essential changes should take place in the population of the several states. The election would naturally hold good only for one session of the preparatory committee, and would have to be repeated for each successive session. In cases where states constitute by themselves an electoral district, the election would evidently consist in the *de facto* appointment of a given individual. But where the electoral district was composed of several states the individual member must be chosen by direct vote of the states comprising the district, and must be one particularly suited to fulfil the important duties involved. In this way the second- and third-rate states will seek out such persons as appear to be experts of special distinction, particularly by reason of their experience obtained at the last Conference. The further

proposal in Article X, that the deputy members shall be elected by the preparatory committee itself, is based upon the consideration that in this way it is possible for the preparatory committee to call in distinguished authorities to take part in its labours with a deliberative voice.

The members of the committee are primarily agents of the international union and not of their own governments. Nevertheless, they must keep in touch to a certain extent with their home governments, because the result of the work of the committee is wholly dependent upon the fact that the programme of the preparatory committee shall be approved by the members of the union. The states not represented upon the committee will in any case be inclined to take a very critical attitude towards the work of the committee. But if the programme adopted should not even meet with the approval of those states whose delegates have adopted it, it would be of no value whatever. Accordingly, although the members of the committee could not be bound in a formal way to follow the instructions of their own governments, because, as has been said, they must look after the interests of the entire international union whose agents they are, yet there must exist a certain confidence between the members of the committee and the governments of the states of which they are citizens. With this object in view it is proper that a provision should be adopted making necessary a ratification of the election by the home government. For it would be always possible that in an electoral district composed of several states the choice might fall upon a person who was not agreeable to his home government. If ratification were refused, a new election would naturally follow, and the choice could then evidently fall upon the representative of another state. The possibility of such an outcome would have the result

of preventing a state from refusing ratification on trifling grounds. In the case of the deputy members appointed by the committee itself, it would not be necessary to have their appointments ratified until they were called to be regular members in consequence of a vacancy. With respect to the meeting of the committee and its tasks, Article X of our draft follows closely the *vœux* expressed at the Second Hague Conference.[1]

> Article XI. In spite of the principle of the legal equality of the states of the union, as expressed in Article III of this Constitution, the influence of the states in judicial and administrative institutions of the international union, e.g., their representation in the composition of such institutions, can upon grounds of expediency be graded in amount. But in such cases relative equality at least is to be secured as far as possible, by making the differentiation in the said rights follow a fixed uniform standard.

Remarks on Article XI. In explanation of this article we may refer to statements made in an earlier section.[2] As a standard for the application of a relative equality, the

[1] See above, p. 191.

[2] See above, p. 223 et seq. It may be mentioned here that even Schlief graduates the influence of the several states in the composition of the international court proposed by him. He proposes to assign one vote to powers of the third rank, two votes to powers of the second rank, and three votes to those of the first rank. He considers Serbia, Greece, Bulgaria, Denmark, and Switzerland as powers of the third rank; Holland, Portugal, Roumania, Belgium, Sweden, and Norway as powers of the second rank; and Spain, Italy, Great Britain, France, Austria, Germany, and Russia as powers of the first rank. Powers outside of Europe are, as has been said above, not considered in his system, and, in contrast to the attitude taken by the Hague Conferences, he excluded, among the European states, Montenegro and Luxemburg as being too diminutive, just as San Marino, Monaco, and Lichtenstein were excluded at The Hague.

population of the state must, as was there said, be the ultimate test. A practical application of the principle of this article has already been made in the preceding article relating to the composition of the preparatory committee; it seems, however, useful to go beyond that single case and to lay down a rule which can be followed in similar cases, so that the reactionaries may not come forward each time with the objection that the institution, in the form proposed, runs counter to the principle of legal equality contained in Article 3 of the Constitution.

> Article XII. The common expenses of the international union shall be borne by the members of the union in the proportion fixed for the international bureau of the Universal Postal Union. The financial needs of the international union shall be determined from year to year by the International Administrative Council. On the basis of this determination the contributions of the individual states shall be collected by the Administrative Council at the same time that it renders its report upon the expenditures of the preceding year. The administration of the treasury is in the hands of the International Bureau of the Permanent Court of Arbitration under the supervision of the Administrative Council.

Remarks on Article XII. With respect to the finances of the international union it is sufficient to extend the agencies which were created for the support of the arbitration institutions to other possible common institutions. Accordingly, it is most natural to extend to the common expenses of the international union the principle expressed in Article 50 of the Convention for the pacific settlement of international disputes, by which the expenses are met by contributions according to a fixed standard. But that in so doing we are dealing with institutions which are really common to all the members of the union is sufficiently

made clear in Article VI, paragraph 3. Ultimately a special budget must be prepared for the narrower unions with their special institutions within the larger international union. It is, however, the first task of the permanent Administrative Council to prepare the budget of the entire international union on the basis of the experience of the preceding year, and to determine the quota to be paid by the several states and to collect the corresponding sums from them. In accordance with its general duty of presenting a report (see Article IX) the Administrative Council has the special task, on the occasion of collecting the contributions for the new year, to lay before the members of the union an account of the expenditures of the preceding year. In this case also it is merely a question of extending the provision of Article 49, paragraph 7, of the Arbitration Convention. Likewise the provision that the International Bureau of the Permanent Court of Arbitration must administer the finances of the international union under the supervision of the Administrative Council contains nothing new.

Article XIII. The denunciation of this convention is effected by a communication in writing to the International Administrative Council at The Hague, which shall immediately communicate a duly certified copy of said denunciation to the members of the union, informing them of the date on which it was received.

The denunciation shall only affect the power announcing it and only upon the expiration of one year after the notification has reached the Administrative Council; likewise the pecuniary obligations of the seceding state do not terminate until the expiration of the budget year following the expiration of the year after the notification of the denunciation.

The seceding state has no share in the property of the international union.

A state which secedes from the union loses at the same time its membership in the narrower judicial and administrative unions which the international union has created among its members.

The denunciation of the Convention for the pacific settlement of international disputes involves on the other hand a simultaneous secession from the international union.

Remarks on Article XIII. In accordance with the international character of the union, Article I of the statute has already laid down that each member of the union must have the right, under observance of certain formalities, to withdraw from the union. The object of this concluding article is to determine these rules more precisely. The necessity of a written denunciation is in keeping with the importance of the act. Moreover, it seems, in my opinion, to be more in keeping with the character of the international union that the denunciation should be communicated to the International Council as the special organ of the union, and to be communicated by it to the states of the union, rather than that the Netherland government should be assigned that function, as is the case in Article 96 of the Arbitration Convention.[1] Naturally the denunciation cannot take effect immediately without disturbing the welfare of the entire union. As regards the period which must elapse before the denunciation takes effect, Article XIII follows the model of the Convention for the pacific settlement of international disputes, with the modification that the pecuniary obligations of the seceding states continue until the end of the budget year following

[1] An analogous provision concerning the organ to which the denunciation is to be notified is to be found in Article 55 of the Convention relative to the Prize Court, and in Article 35 of the Convention relative to the Judicial Arbitration Court.

the year of denunciation. This modification seems to us to be called for upon practical grounds. It is possible that the denunciation might take place, for example, in December, 1912, after the budget for the coming year from January 1, 1913, to January 1, 1914, had already been made up and the calculation and the apportionment of the quota determined upon. The secession of the state would then take place in December, 1913. It seems, however, important to impose upon the state the obligation to contribute to the expenses of the union until the end of the budget year, that is, until December 31, 1913, because otherwise an entirely new calculation of the quota must take place for the sake of a relatively trifling sum. The same practical need would, moreover, arise if the budget year of the international union were not to coincide with the calendar year. Further, Article XIII endeavours to make it clear that the seceding state cannot advance any claim to the property of the international union. For it is possible that there may be cash on hand representing a surplus in the budget, &c., which must remain the undivided property of the international union, so that it may be able to fulfil its functions in the future.

Further, it does not seem proper that a state which secedes from the general international union should continue to have a share in organizations for judicial or administrative purposes, which have been created by the international union as such merely for the narrower group of its members, and which act in the name of the international union for this narrower group. For a state which voluntarily secedes from the international union thereby excludes itself from these advantages. It seems, for example, unreasonable that a state seceding from the general international union should continue any longer in the special

union of the International Prize Court. The result would be an impossible situation in which, for example, the seceding state would be no longer represented in the body which superintends the Prize Court, because in this case the Administrative Council exercises its supervision under the exclusive co-operation of the powers which are parties to the Prize Court Convention. But the seceding state, by reason of its departure from the general international union, has no longer a seat and a voice in the Administrative Council. It seems therefore necessary that secession from the special organization of the Hague international union should coincide with secession from the general international union, provided that the special periods of denunciation required for secession from the special unions be observed, as, for example, in the case of the Prize Court.[1] The fact that secession from the general international union carries with it exclusion from the narrower judicial and administrative unions, which the Hague international union has erected for the benefit of its members, will, the more numerous and varied these organizations gradually become, have the precise result of preventing a civilized state from taking lightly the step of resigning from the Hague international union.

On the other hand, membership in the international union must stand and fall with membership in the Permanent Court of Arbitration. This court is the central point of the whole international system, just as the judicial authority was the central point of state control in the German states of the Middle Ages. It was from the necessity of a judicial system between the states, however loose and optional in character, that the union acquired its whole existence. The state which would wish to have no further part in this

[1] See the provision in Article 53 of that Convention.

optional jurisdiction, carrying with it the right of the state to appoint its own judges, and which would make use of its right of denunciation,[1] would have forfeited its moral claim to continue a member of the organized community of civilized states. It seems proper that this rule should be made a provision of the constitution of the union.

[1] See Article 96 of the Convention for the pacific settlement of international disputes.

CHAPTER V

THE SUBSEQUENT DEVELOPMENT OF THE WORLD FEDERATION

WHEREAS in his work *Die Organisation der Welt* the author undertook the task of presenting an historical sketch of the idea of the political organization of the civilized world and the practical attempts at its accomplishment, and of the struggle between national and international points of view, in writing the preceding chapter he has had in mind the object of a declaration of principles. Last of all, a clear statement had to be made of what the work of The Hague signifies at bottom from a legal point of view. Since things are in such a condition of change, the author evidently could not limit himself to the results of the First Hague Conference, but was obliged to take into account the results of the Second and the prospective results of the Third Conference. In this latter respect, however, the author has deliberately kept within the bounds of the more or less definite programme for the Conference of 1915, and he has rejected all projects which have not been recommended for consideration by the Third Hague Conference by those who are specialists in international law, or which have been recommended only by isolated individuals.[1] For, as has been said, the author

[1] Among the various tasks which the author has assigned to the Third Hague Conference for the development of the world federation, the only positively new one is the establishment of a court which shall decide in the last instance upon the obligation of executing foreign judgments. But in this instance we are dealing with a relatively subordinate proposal, which is, as regards the object in view, connected with the effort to create

had in this instance a statement of principles chiefly in view, and was well aware what a tremendous demand he was making upon German scholars of to-day in expecting them to recognize a work upon international law as a scientific treatise, when on the very first page the author proclaimed himself a pacifist and an admirer of Baroness von Suttner.[1] The author, however, has confidence in

at The Hague an international supreme court for suits arising out of international private law. This idea, which I have also advocated, was brought up for debate at the Second Hague Conference by no less a person than the leading German delegate, Baron Marschall, and was also advocated by the Italian diplomat, Count Tornielli, both prominent statesmen at the Conference, as Zorn rightly says: see *Actes et documents*, vol. ii, pp. 447, 472. Baron Marschall speaks as follows: 'Perhaps the question will be ripe for decision at the next Conference.' See also what is said by Asser, op. cit., vol. ii, p. 897, and also by Jarousse de Sillac, op. cit., and by Zorn, *Das Deutsche Reich und die internationale Schiedsgerichtsbarkeit*, p. 46. Naturally this does not guarantee the adoption of the project, but the author merely desires to protect himself in this connexion against the accusation that his position as a pacifist has led him to advance Utopian plans. But if the supreme court for private suits arising out of international private law is not a Utopian scheme, then the same is true of the idea of the author to create a court which shall decide petitions for the execution of foreign judgments. The same is to be said of the task assigned by the author as the chief work of the Third Hague Conference, the adoption of a constitution for the international union, which is closely connected with the request of the Second Hague Conference itself that in the future the Conference be organized.

[1] In pt. 3 of the *Friedenswarte* of 1912 Fried gives us an instance of the incredibly reactionary attitude of German scholars toward the peace movement, an instance which we can only describe by the schoolgirl expression, 'delicious'. Professor Conrad Bornhak of Berlin begs them not to send him the *Friedenswarte*, because he is not in the least interested in Christian Science, spiritual séances, peace movements, and similar psychopathic phenomena. Yet Herr Bornhak is professor of public law at the University of Berlin, and the *Friedenswarte* is, for all who desire to follow the progress of modern international law, 'a journal of indispensable value' (Lammasch). In this connexion it may be pointed out how completely the majority of our historical writers are lacking in an

German science that it is ready to look around the blinkers of a narrow nationalism and to see what has been put before its eyes in the preceding chapters, and that it is prepared to estimate at its full value the knowledge obtained from this book, no matter how hard that may be to the nationalist, to whom internationalism has thus far passed for anti-nationalism. The importance of this recognition of the existence of a world federation consists primarily in the fact that international law is thereby placed, so to speak, upon a new platform, and that an organized community is coming forward in place of the anarchical community, and that the whole doctrinal system of international law is experiencing a great change. For one who undertakes hereafter the task of writing a text-book on international law cannot satisfy himself with starting out by considering states as legal subjects of international law, but he must explain from the very beginning of his work the organized community of states, the international union of the Hague Conferences in its formation, its composition,

understanding of the work of The Hague. Formerly they played a leading rôle in the intellectual movement which brought us our national state. Why should they not now co-operate (with the exception of Lamprecht !) when there is question of reconciling nationalism and internationalism in a new age ? Is it not precisely the task of the historian to estimate events according to their historical significance ? This is an instance in my opinion of the fatal effects of the fact that scientific research has remained for the most part in the hands of a self-satisfied and prosperous *bourgeoisie*, which considers the more or less conservative attitude with which it regards things as a completely unprejudiced one, independent of party politics and purely scientific in character ! As if there could be a science entirely freed from the personality of its exponents ! In my opinion an age, in which as to-day the representatives of science are wholly in the camp of the conservatives, will also produce a body of scientists who will refuse to co-operate in the realization of future ideals. As a convincing proof of this we have in my opinion the present German science of public law and international law.

its organs, its functions, &c. It would be no small satisfaction to the author of this study if, by presenting the work of The Hague for the first time in the full light of the great intellectual movement of pacifism, he has succeeded in influencing the doctrines of international law in the manner sketched above. But the author has had yet another object before him in his exposition of the international union of the Hague Conferences. As an exponent of a not merely descriptive but legislative science it has been his intention to find a basis upon which the theory and practice of international law can be further built up, in order to realize those demands which as critical idealists we must put forward for the further development of international law.

If, as the author of these pages thinks, we already actually live in a world federation, and if the beginning has been made of a political organization of the civilized world, then we must put before ourselves the question, what institutions are we to create for this federation, what rules are we to lay down in the fundamental law of the federation, in order that the ends of this political organization may also be in fact attained? In this respect the method of investigation cannot be irresolute. After international law has once been forced by the Hague Conferences to follow the guidance of organized pacifism, we shall find in the work of pacifism the most valuable material with which to advance international law to an ever higher plane of development. In his distinguished work which appeared between the First and Second Conferences Nippold called attention to the fact of how much water Pacifism had to pour into its wine before the most modest part of its demands could be realized at The Hague in respect to optional arbitration. That is undoubtedly true; but

so also is the following. After pacifism has been obliged to make so many concessions to the situation of international anarchy existing up to this time, things will move the other way, and the development will now proceed in such a manner that the existing international law will yield step by step to pacifism, until the latter has gradually returned victorious to the aims which it first had in view in the idealistic enthusiasm of its youth. And this development will come about relatively quickly. It is a well-known inherent law of things that a development once begun increases its pace as it proceeds, and thus it was, as has already been said in the introduction,[1] that the delegates of the Hague Conference have been, as they themselves have said, time and again surprised by the rapidity of this development. The further development of the world federation will therefore not be long delayed, and it will come about much sooner than persons are inclined to believe at the present day. Accordingly, it is an urgent need of the modern science of international law to obtain with the help of the preliminary labours of the pacifists a clear knowledge of what must be done in order as far as possible to secure for the civilized world peace through law, and to deliver ourselves from the present unsatisfactory condition of international relations. The most important problems which arise in this connexion will be briefly pointed out in the following pages. We must deny ourselves in this place a detailed treatment of individual points. It would lead us too far afield, because there is already a comprehensive literature of pacifism upon each and every question, though to be sure German jurisprudence has thus far been entirely blind to it. In my opinion the following are the important questions at issue :

[1] See above, p. 8.

Section 1. The Stability of International Territorial Relations

If the nations have formed themselves into a world federation for the maintenance of the general peace, that act involves, in my opinion, as a legal consequence the mutual recognition of their independence and their territorial integrity. To one who has an instinctive sense for law it is something simply inconceivable that an organization should be set up by the civilized world for the preservation of peace through law, and that two members of the said federation should then go off and divide up between themselves the territory of a third member of the federation, or at least compel this third member by a threat of force to enter into a relation of international dependence, without the third state having the right to demand protection from the federation, as has happened in the action of Russia and Great Britain towards Persia.[1] As a matter of fact,

[1] With respect to Persia, see p. 90, note 1. The treaty in question, by which Russia and Great Britain came to an agreement upon a northern and a southern ' sphere of influence ' in Persia, bears the date of August 31, 1907, and accordingly was concluded while the Second Hague Conference was in session ! It may be found in Strupp's excellent work, *Urkunden zur Geschichte des Völkerrechts*, vol. ii, p. 192 et seq. The treaty says in its preliminary clauses that the parties mutually obligate themselves to respect the inviolability and independence of Persia, but the delimitation of a northern sphere of influence in favour of Russia and of a southern sphere of influence in favour of Great Britain does not seem to be in any way a means of securing the independence of Persia. Accordingly, if those words respecting the independence and inviolability of Persia are anything more than a figure of speech to cover over the real intentions, they can only refer to that part of Persia lying between the northern and southern spheres. But as has been said above, on p. 90, note 1, those powers have in the meantime altered their intentions and their attitude with respect even to this middle section, and it has already been discussed in the press that as a result the Russian and British

conditions in Persia are perhaps such that unless the country is divided up, that is to say, subjected to European control, its economic development is impossible. That would, in my opinion, of itself justify an intervention on the part of foreign countries,[1] but even then the inconsistency arises that at the First Hague Conference Persia was invited to attend as a participant on equal terms with the other states. In any case we cannot get away from the contradiction between the legal position granted to Persia in this instance and the ultimate fate of the Persian Empire.[2]

boundaries would soon meet in the middle section of Persia, when Persia, which has in the meantime been reduced to dependence upon both powers, would disappear entirely from the map.

[1] On this point the opinions of scholars of international law are, to be sure, at least divided, or indeed entirely opposed. I personally represent the view that just as at the present day in our private law the ownership of landed property is undergoing a process of socialization, this process will also be applied to international property. International property will also lose its rigid character. It seems, for example, inconceivable that a country thinly populated and without prospect of growth of population from within should long refuse to admit foreign immigration, even on the part of another race. In this case the idea that the inhabitable earth belongs in a certain sense to all mankind will finally prevail, just as the private landed property of individuals experiences more and more limitations in favour of the whole body of the citizens; by which last statement, however, I would not recommend the expropriation of political opponents after the manner of Polish legislation in Prussia. On the question of the immigration of foreign races, see also Strupp, '*L'Immigration japonaise aux États-Unis*,' in the *Revue générale de droit international public* of 1912.

[2] To that extent the Italian Group of the Interparliamentary Union was entirely right when, with respect to the injustice of the Tripolitan war, it recently expressed itself through that body to the effect that no attention had been paid by the Union to the action taken by Great Britain and Russia against Persia. The Italian interparliamentarians here expressed the just conviction that the action of Italy also was contrary to the fundamental principles of the Hague Conventions. But manifestly this fact cannot justify the action of Italy, nor take from the

On the contrary, the conclusion might be drawn that the whole federation of civilized states for the maintenance of peace through law was only a farce played by very unfeeling hypocrites. But that would be equivalent to surrendering the whole cause. It is a much truer explanation to say that we are in a period of transition where striking inconsistencies of that kind are simply to be explained by the fact that the old system of the relations of states to one another is breaking up and the new system is not yet sufficiently developed. The fate of Persia is unquestionably in contradiction with the fundamental principles of the Hague Conventions, but on the other hand these principles have not yet come to dominate to such an extent that the organization of The Hague could offer a sufficient protection to every country. The same point is to be made with respect to the Italian attack upon Tripoli. It is true that the Hague Convention leaves it possible for the members of the international union to go to war with one another, but the manner in which this war was begun was absolutely inconsistent with the spirit of the Hague Convention. For if two states are members of a union which has been founded for the maintenance of the general peace it is strange conduct if one fine morning one of them announces to the other that it finds itself obliged to occupy two provinces belonging to the other, and that if the other does not signify its assent within twenty-four hours and thus renounce that part of its territory, it will proceed to exercise force.[1] If the work of

Interparliamentary Union the right to reprimand in a later case what it neglected to reprimand in a former one.

[1] See the text of the Italian ultimatum in Strupp, op. cit., Supplement, p. 71. We may in this connexion content ourselves with pointing out in a general way the striking contradiction between the Italian ultimatum and the spirit of the Hague Convention, and prescind from the fact that

The Hague, begun with such bright prospects, is not to suffer the slightest set-back from such events, by having public opinion regard the whole affair as mere hypocrisy, its champions must again and again point out that we are dealing with phenomena which are only to be explained by the fact that the results of the work of The Hague have not yet been rightly understood on all sides, and that above all it is still very incomplete and in need of development. If this idea, which in my opinion is the only correct one, should be adopted, the incident of the Italian campaign against Tripoli may be attended by the happiest results for the further development of international law. For it will then be realized that the relations between the members of the world federation cannot continue as they are at present. Either the federal union will be dissolved because it is exposed to the curse of ridicule, or it will be strengthened in such a way that such events cannot again occur. And of the two alternatives the force of public opinion would decide in favour of the latter. Thus we should come to the conclusion that the political organization of the civilized world into a world federation must bring it about that the members of the federation shall as a first step recognize their mutual independence and the integrity of their mutual territorial possessions.

Italy by its action has in several respects violated formal law. We recall the fact that in 1856 Italy assisted in guaranteeing the integrity of Turkey, that this guarantee of the Treaty of Paris was expressly confirmed in 1878, that the Treaty of 1856 contained an obligatory mediation clause, and finally that the situation was not such that the good offices or the mediation of friendly powers could not have been appealed to, as is provided for in Article 2 of the Convention for the pacific settlement of international disputes. Upon the whole problem of the Turko-Italian War, see the excellent work of the distinguished British publicist, Sir Thomas Barclay, *The Turko-Italian War and its Problems* (London, Constable & Company).

That is an old proposal of the pacifists which, as we have said above, appears to us at the present day as a self-evident result of what has already come about.[1] The theoretical objections against the proposal are easily disposed of. On the one hand, it is argued that it is not clear what is meant by the 'undisputed territory' which the states are mutually to guarantee to one another.[2] In my opinion the only standard which can be applied is that of *de facto* possession at the time the treaty is concluded. It depends upon the fact that states are ready, with respect to political claims of the past, 'to ignore the heritage of former times, which contains so many elements of conflict and the memory of which is a perpetual danger. . . . We do not have to occupy ourselves to ascertain whether the territorial questions have been equitably regulated before our time; but inasmuch as they have been regulated in one way or another we can say that an interminable

[1] We cannot go into the history of this proposal here, and instead content ourselves with a reference to the fact that within recent years the American pacifists in particular have been worthy advocates of it. At the meeting of the Interparliamentary Union at Berlin in 1908 the American Group, under the leadership of R. Bartholdt, made the motion 'that the right of each of the nations represented at the Interparliamentary Conference to the permanent possession of its undisputed territory and to the full and free exercise of their rights of sovereignty within the limits of the said territory is hereby recognized.' This clause should in the future be included in general arbitration treaties. See the text of the motion and Bartholdt's address in support of it in the Report of the meeting, p. 62. At the conclusion of the conference a special commission was appointed to study the question.

[2] This criticism is rightly advanced by Zorn, in his memorial volume to Güterbock, p. 235, against the proposal mentioned in the preceding note. As a matter of fact it was intended by this proposal that the guarantee clause should be adopted only in *individual* treaties providing for obligatory arbitration, and that its adoption should be left to the judgment of the particular governments and should relate only to undisputed territory, without defining what was meant by that term.

discussion of this subject would be a perpetual menace to our cause [world peace].' (Bartholdt.)

If this guarantee of existing territorial possessions were to be inserted in a collective treaty, e. g., in the fundamental law of the world federation, even states which, like France in regard to Alsace-Lorraine, still entertain hopes of a restitution of former possessions, would be more ready to agree to it than if this proposed sacrifice were expected of them in a treaty with a single state.[1] Another objection which all opponents of pacifism will immediately raise is that the pacifists are indulging in the foolish hope of trying to exclude from the life of states that struggle for existence which is a law of nature. Now it is a *petitio principii* to seek to apply natural laws of that kind to sociological problems in the relations of men. Although man may have developed from the beast, yet he has reached such a plane of development that his acts are influenced by intellectual factors which defy the ordinary laws of nature. Consider such an event as the sinking of the *Titanic*, where a chivalrous feeling for the protection of the weak and the motive of conjugal love have so strikingly overcome the instinct of self-preservation. But, as a matter of fact, no one expects to abolish war between the nations, but only that war will take place under other and more humane forms. Has fighting between individuals been abolished because

[1] The situation is the same here as in the case of the obligatory arbitration convention. Those who are in touch with the situation know that we could succeed in concluding such a convention even with France by resorting to a collective treaty, whereas in view of the traditional breach between the two countries an obligatory arbitration treaty between them is for the present out of the question. Likewise this consideration, in my opinion an important one, makes it greatly to be regretted that it was precisely Germany which defeated the collective treaty at the Second Hague Conference.

A can no longer fall upon *B*, kill him and take away his land? Consider for a moment the conditions of the Middle Ages when the small man, as Thomas Buckle so well says in his *History of Civilization in England*, had no greater wish 'than to have a warm cloak and to be allowed to live'. How well is the property of individual citizens protected at the present day by the law of the state, and yet how constantly is property changing hands among them! It is a question, therefore, merely of applying to its full extent the principle of Hugo Grotius that the states are in their relations to one another subjects of international law, and of guaranteeing, by the development of an international organization, the necessary legal protection to the existing territorial possessions of states. To allow downright wars of conquest, such as that at present going on in North Africa, seems absolutely inconsistent with a higher development of the civilized world. On the other hand, a mutual guarantee of territorial possessions would by no means be equivalent to the peace of a graveyard.[1] It is quite con-

[1] The well-known historian, Kurt Breysig (quoted in no. 3 of the *Friedenswarte*, 1912, p. 110), says to the same effect: 'It is inconceivable how the continuance of war can be imposed upon the nations like a quack cure when their minds are wholly averse to it. Before the development towards world peace, which is at present taking place, reaches its goal, states will indulge many times in their old and splendid (?) love of battle. The only important thing for us Germans in this connexion is that we obtain more room upon the earth for the exuberant growth of our population, whether by the use of stratagem and force, so long as the old rule prevails, or by purchase and by treaties with individual states, by general international agreements, which will be the method of the future.' Breysig thus sees at least the approach of a time when territory will no longer be acquired by force. If he thinks that at the present day he must recommend to his people the acquisition of territory by stratagem or force, we are protected from following his advice by the high sense of moral responsibility possessed by our Kaiser in these matters. Moreover, it is to the credit of modern pacifism to have shown that political control

ceivable that nations will continue to advance and decline, and territory change hands accordingly, even without it being necessary for one state upon the most threadbare grounds to make one day demands upon another state which cannot be carried out, and then to attack it with armed force, and at the same time be acting in complete conformity with existing international law! Even here the recognition of the solidarity of all human interests will finally prevail. For in the last instance all nations alike must suffer from the fact that they can rely only upon their own strength in the defence of their territory.[1] In this situation lies unquestionably the chief reason for the

over a country is not a decisive condition of economic exploitation. I have in mind particularly the thoughtful book by Norman Angell, *The Great Illusion*, the merits of which we can estimate highly without being blind to its defects. What answer can be made to the statement that at the present day, without the expenditure of a penny for political control, Germany draws a greater tribute from South America than Spain, which spent for that purpose mountains of gold and seas of blood? It was with a deep sense of this fact that a certain French deputy made the melancholy observation: 'You tell me that the Germans are in Agadir. I know that they are in the Champs-Élysées.' As economic life grows more and more international it appears to be quite impossible wholly to prevent in the future the economic development of foreign countries. Rather a similar result is to be expected from such efforts as from the recent agrarian endeavour to restrict the stock exchanges. Siemens, the founder and director of the German Bank, said of the restrictions of the Stock Exchange law: 'We can drive a coach and four through them.' Economic factors are even at the present day becoming more powerful than political ones, although it naturally cannot be denied that it is possible to influence economic conditions for the sake of the state.

[1] That this condition of things has at the same time a certain educative value, in that it calls for the exertion of all one's powers, is not to be denied. At the same time, in my opinion, the harm is greater than the benefit. The experience of states teaches us that governmental protection and the development of the defensive powers of the individual are quite reconcilable. Consider, for example, the physical development of the British!

daily increasing burden of armaments, which block the path of civilization and which appear as a threat to neighbouring nations and have as their result that insane rivalry under which all nations alike are suffering. An international guarantee of existing territorial possessions appears, therefore, to be the natural goal of the whole international development, and even Zorn, whose attitude towards the aims of pacifism is one of indifference and scepticism, admits that this proposal is a practical one.[1] To be sure, he denies at the same time that under present conditions the plan has any prospect of obtaining general favour. Nevertheless the prospect would indeed become considerably greater if, as we propose, a fundamental treaty, a constitution of the international union, were to be adopted between the states. For then, in my opinion, the question immediately arises, shall this truly natural consequence of the whole situation find expression in a definite guarantee clause, similar, say, to that contained in Article XI of the Constitution of the old German Confederation:

> All the members of the Confederation promise to protect both Germany as a whole as well as each individual federal state against any attack, and mutually guarantee

[1] In the memorial volume to Güterbock, p. 236. Zorn rightly compares the proposed guarantee clause with the principle of legitimacy adopted by the Holy Alliance. This principle was to be sure overthrown, but principally because the whole weight of the coalition was directed against constitutional reform and endeavoured to check the irresistible progress of the modern state. In his thoughtful book, *World Organization and the Modern State*, 1911, p. 146, the former American ambassador, David J. Hill, says that 'The Holy Alliance was engaged in the unholy task of suppressing jural development by the use of armed power. It would be quite a different enterprise if modern states should decide, by the aid of mutual guarantees, to establish more firmly the jural relations which they all recognize and affirm; and thereby substitute the security of law for the hazards and menaces of physical force.'

to one another their territories embraced by the Confederation . . .

As intelligent a thinker as Schlief has expressed the opinion that an organization of states is inconceivable unless such a provision is included in the fundamental treaty;[1] but I think that Schlief is mistaken in this view. For as a matter of fact we have already in the work of The Hague the beginnings of a state system without such a guarantee clause, and if the advocates of this proposal insist unconditionally upon its inclusion in the statute of the world federation, it is to be feared, I think, that this statute will never be adopted. It must not be overlooked, namely, that the natural correlative of such a provision is an absolutely obligatory world arbitration treaty and an unlimited jurisdiction on the part of the federal organ to decide disputes. Article XI of the Constitution of the old German Confederation contains also the following provision:

> The members of the Confederation likewise bind themselves under no pretext to make war upon one another, nor to follow up their disputes by force but to bring them before the Federal Diet. This body has then the duty of seeking a settlement by means of a committee; in case this method should fail and a judicial decision be necessary, it must bring about such a decision through a properly constituted court, to whose decision the parties are thereupon bound to submit.[2]

[1] See the chapter on 'Stability', op. cit., p. 331 et seq., which is one of the best in the whole book.

[2] See the detailed provisions in the Vienna Final Act, Article 19 et seq. Hence the Diet could of its own accord and without being appealed to, when acts of violence were apprehended between the members of the Confederation, take preliminary measures to prevent recourse to self-help, and was bound above all to have a care for the maintenance of territorial rights.

Now while it is true that 'so prudent and deliberative a body' (Nippold) as the Institute of International Law at its session at Edinburgh in 1904 advocated the abandonment of all reservations from the obligation to arbitrate, yet as a practical question the complete renunciation of the right to make war upon one another on the part of the members of the international union has not thus far come under discussion.[1] But it would appear to be at least exceedingly difficult, if not impossible, for the states of the international union on the one hand to reserve to themselves in their statute the right to carry on war, and on the other hand to guarantee to one another the undisturbed possession of their mutual territories. The greatest difficulties would, in my opinion, arise from the fact that the aggressor would represent any territorial changes as permissible war, while the party attacked would insist that it was a violation of the international guarantee of his property. At the least the problem here raised must first be very carefully studied and thought out, and it seems to me to be better and more expedient not to introduce this question into the practical work of the Third Hague

[1] The reservation that the given dispute, to be submitted to arbitration, must not affect the independence of the state could in the future be readily renounced in case the international union as a body should guarantee to each member the continuance of its independence. Likewise the reservation with respect to national honour could easily be got rid of, if states would adopt the attitude of Socrates that honour is a spiritual substance of which the effrontery of others cannot rob us. Unfortunately, at present nations rather adopt the attitude of college students, and a sober press assures an educated public, on the occasion of the quarrel between a French subordinate officer and a German consular officer at Casablanca, that the honour of the German nation is at stake! See upon the question of 'national honour' the article by the celebrated scientist Ostwald in the *Friedensbewegung*, 1912, p. i, p. 10 et seq. The whole tendency is towards obligatory arbitration without reservation.

Conference and thus endanger what is politically possible by making impossible demands. In this instance also the fruit should not be plucked before it is ripe, and we must trust to the innate force of things to bring about their further development.[1] In the end the demands of pacifism must triumph here also. But first of all the idea itself must win its way into the mind of the civilized world.[2] Accordingly, we may omit in this place the consideration of what juristic forms would be necessary in order to give practical significance to such a guarantee clause in the statute. In my opinion it would not be enough that a violation of the guarantee of territorial rights should be regarded by the other powers as a *casus belli*, but it would be necessary that such a violation should be made the subject of regular legal procedure—which would amount to an international rule of *uti possidetis*,—and it would be necessary to establish an international executive to carry out the judicial decision in favour of the injured

[1] Perhaps in this case also treaties of guarantee between smaller groups of states will precede the general treaty of guarantee. The possibility of this was adverted to by Haussmann in the debate upon the said proposal before the Interparliamentary Union, with an interesting reference to the two conventions relative to the East Sea and the North Sea of April 23, 1908. Russia, Germany, Denmark, and Sweden were parties to the first, and Germany, Denmark, France, Great Britain, Holland, and Sweden parties to the second. Both conventions contain a guarantee of the integrity of the territories of the signatory powers, lying on the East and North Seas respectively. For the documents, see Strupp, op. cit., vol. ii, p. 196 et seq.

[2] When we consider that the modern state subjects itself to law at the present day in domestic matters and voluntarily gives to its own citizens legal guarantees against the government, must not the time come when legal guarantees will exist in the relations between states? See the excellent remarks by Hill upon the capacity of the modern state to adapt itself to legal guarantees and upon the limits and principles of international guarantees, op. cit., p. 176 et seq.

party.[1] As things stand at present we may content ourselves with the knowledge that the existence of a statute of the international union, even without a guarantee clause, already offers a certain indirect protection to the members of the union against violent conduct; at least a moral protection which will grow in importance from day to day. But even from a strictly legal point of view it should be considered that if State A should suddenly rob State B of its independence, both being members of the union, even at the present day the other members could regard the act as a violation of the statute of their union, which in its first article enumerates the independent states which are members of the union. Accordingly, it is even now possible for the other states to intervene if nothing more were done than to adopt that statute of the international union, and public opinion would have to be educated to the point of actually demanding such interposition.

Section 2. International Execution

In considering the project of inserting in the statute of the international union a guarantee clause in favour of the independence and integrity of the members of the union we were led to bring up a subject of further development in the form of the establishment of an international executive, which must protect, in the last instance with force, property rights when threatened; and we were thus brought face to face with a new problem for the development of the Hague international union. In respect to this

[1] As was the case in the German Confederation, which possessed a duly regulated executive, see Article 33 of the Vienna Final Act. It is surprising that Schlief (op. cit., p. 321) thinks an executive power to be out of place in his state system.

question, which has been already discussed a thousand times by the pacifists,[1] we must first of all make it clear that the establishment of an international executive would not affect the federal character of the Hague organization, based as it is upon the sovereignty of the individual states. When Pohl says: 'Forcible execution against sovereign states is inconceivable; the idea of execution belongs to the dream of a world state; even in the case of the judgments of the Prize Court the question of execution is the squaring of the circle,'[2] all that is simply false. In federal execution a state is subjected merely to its own will, in so far as it has in advance agreed by treaty to submit to such execution in cases where it has acted contrary to law.[3] Had the author of that statement, that forcible execution against sovereign states is inconceivable, carefully studied the literature upon federations, he would have come to the conclusion that the existence of federal executive power for the federation is actually the rule,[4] and yet, according to the prevailing theory, we are dealing here with an organization of sovereign states. If the establishment of an executive power within the world federation is

[1] Following our remarks at the beginning of this chapter, we must also refrain here from elaborating upon the entire pacifist literature upon the subject, and from giving in that connexion a history of the said problem. In this place we can do no more than state the problem.

[2] Pohl, op. cit., p. 98, where he refers to the fact that at the First Hague Conference, owing to the vigorous opposition of Germany, the Arbitration Court was not even granted the right to fix a time for the execution of its award. See on this point Meurer, op. cit., vol. i, p. 345 et seq.

[3] Jellinek, *Die Lehre von den Staatenverbindungen*, p. 176.

[4] As has been said above, in the old German Confederation federal execution was provided for to maintain the fundamental law of the federation and to carry out decrees of the Diet, as well as judgments of the federal court and arbitral awards. See Meyer-Anschütz, *Deutsches Staatsrecht*, 1905, p. 131.

actually possible without involving at the same time the transition to a federal state,[1] it is, on the other hand, in the last instance greatly to be desired. Even Meurer speaks of the absence of forcible execution as the ' weak point of arbitration ', but on the other hand he advances the opinion that international law must get along with mere ' obligatory moral force '.[2] Now it is true that we must state, to the honour of the civilized nations, that in all previous arbitration cases, great as has been their number and hard as it has often been from material and personal grounds for the defeated party to submit, the award has been voluntarily carried out.[3] Nevertheless the existence of an international compulsory execution would be a fact

[1] Wehberg, who in his commentary on the Convention for the pacific settlement of international disputes, p. 52 et seq., to our surprise speaks of himself as an opponent of the idea of an executive power, and thinks that the powers would see in it the first step towards the erection of a world federal state. But such an idea on the part of the powers would be a cardinal mistake, which it is the duty of science to correct in the eyes of statesmen. A federation of states presupposes, to be sure, forcible execution, as Revon has shown ; but such a federation of states is, as we think we have proved, already contained in the Hague work, and will become more and more evident when the Conferences become periodical. Wehberg is wrong when he thinks that the establishment of an executive power would create an institution which would be inconsistent with the present nature of the international community. Arbitration would not thereby cease to be voluntary (Wehberg), for, as has been said above, submission to the executive arm would rest upon the voluntary contractual consent of the parties.

[2] Meurer, op. cit., p. 47 ; in so doing he is able to appeal in particular to Descamps and his famous memorial on the subject of arbitration, pp. 64, 69.

[3] In the few exceptions there was a special reason for the actual annulment of the award, e.g., when the arbitrator had exceeded his powers, new documents had been found, or testimony proved false ; see Wehberg, op. cit., p. 53. As an instance of the loyal manner in which awards have been regularly carried out, Meurer refers rightly to the celebrated *Alabama* case, the outcome of which was very disagreeable to the English.

of great psychological effect. For with the majority of laymen the concept of law is unfortunately still bound up with the idea of compulsion, and the intellectual Philistines of all nations, of whom there is unfortunately no dearth, would be inclined to appraise the judicial work of The Hague quite differently if an international compulsory power stood behind it. But prescinding from this, the importance of federal execution would consist not only in the possibility of securing in this way the fulfilment of international arbitral awards, but just as there was within the old German Confederation a federal executive to uphold the fundamental laws of the Confederation and to carry out the decrees of the Confederation, so in this instance also the existence of an executive would at one stroke make it possible to give the necessary guarantees to the whole body of international law in so far as it has been codified at The Hague. If this were done the progress of law would be advanced immeasurably. The world federation could then at all times interpose in case of a violation of international law. In this way, e.g., neutral states could be given a much more effective protection against the encroachments of belligerents. Of what value this would be is best shown by the following personal experience. I had once at a public meeting a debate with one of the foremost German economists upon the question of the contractual limitation of armaments by means of an individual treaty between the German Empire and Great Britain. The economist declared that he was in principle in sympathy with such a project, but that its adoption should be conditioned by the fact that the German fleet had first attained the same position as that held by the English fleet. I objected very naturally that England could never surrender her advantage in respect to naval strength. If the German

fleet were even approximately equal to her own the fate of war might decide against England, the British ports could be blockaded, and, as is well known, in six weeks England would be faced with a severe famine. We Germans have not the same need of a strong fleet as England has, because we could never be reduced to this peril, but would always obtain supplies through the neutral harbours of Holland and Belgium. Thereupon my opponent answered that naturally immediately at the beginning of a war between Germany and England the Dutch and Belgian coasts would be blockaded by England in spite of the neutrality of those countries. It is not necessary to decide here whether so flagrant a violation of international law is actually to be expected, when Article 1 of the Declaration of London lays down the principle: 'A blockade must be limited to the ports and coasts belonging to the enemy or occupied by him.' In my opinion it would be to underestimate the attitude of the other party and the force of public opinion to expect such a violation of law on the part of a belligerent; besides, the belligerent is in my opinion much too dependent upon the sympathy of neutrals—consider, for example, the financial demands of a modern war and the necessity of obtaining loans in foreign countries,—to be able to turn neutral states as a body against him; but, as has been said, we may leave this question undecided, as well as the question whether by the blockade of Holland and Belgium we should really be reduced to such straits as would the British island-kingdom through the blockade of its ports;[1] it is enough for us to state that even among German scholars there is

[1] Germany would always be able to obtain supplies from the harbours and across the frontiers of other countries, e.g., via Libau in Russia or via Trieste in Austria.

very little belief in the restraining power of the rules regarding the position of neutrals. And not only among them, for why otherwise would Belgium have spent so many millions for its fortifications on the Maas, although its neutrality has been legally guaranteed ? Why otherwise did Switzerland, though neutralized, give its chief attention even in time of peace to making every preparation of a military character in order to prevent the French, in case of a war between France and Germany, from crossing the Alps and attacking Germany from the side of Switzerland ? How uneasy was Belgium when in the fall of 1911 there seemed to be danger of war between Germany on the one hand and England and France on the other over Morocco ! We see, therefore, that the distrust of the observance of the neutrality of states of the second class is general, and we recognize in consequence the importance of an institution which in the name of a world federation for the maintenance of the rules of international law would look to the protection of neutrals. An enormous amount of energy would thereupon be released and could be turned to productive ends. If we wish to have neutral states at all we must in my opinion welcome every possibility which offers itself for the strict observance of neutrality, and such a new possibility is in principle unquestionably presented in the progressive organization of the Hague international union. The merit of having brought forward for international discussion the problem of international execution, which, as has been said, has already been dealt with many times by the pacifists, and presenting it as a task of the Third Hague Conference, can be claimed by the Leyden scholar, Professor van Vollenhoven.[1] He proposed that international execu-

[1] The proposal was first made by van Vollenhoven in the November number, 1910, of *De Gids* (Amsterdam), and he later returned to it in the

tion be organized in the following manner. Each state should, before or after the opening of the Third Hague Conference, declare:

1. That in case the decision of an international court should not be voluntarily carried out and the court itself or the successful litigant should seek execution by force of arms, its government obligates itself to furnish a sufficient part of its maritime forces to support such military action, provided that in the judgment of its government such part of its forces is not at that moment indispensable for national purposes, and that these forces, whether alone or in co-operation with those of other states, are in a position to attain the end sought.

2. That in case a convention with respect to the rights of neutrals in time of war, to which its government is a party, should be violated or menaced by one of the belligerents, its government obligates itself to furnish, at the request of the state in need of help, a sufficient part of its maritime forces to uphold the said convention, provided that in the judgment of its government such part of its forces is not at that moment indispensable for national purposes, and that the forces are adequate.

3. That its government, in cases where a part of the forces of one or more powers, acting alone or in co-operation with it, goes into action and is lawfully flying the inter-

address mentioned above on p. 244, note 1. The proposal was taken up with enthusiasm by the Dutch press, and it was declared that Holland should have the honour of proposing such a fleet at the next Peace Conference. It is true that Jonkheer van Karnebeek, a noted Dutch statesman and former delegate to the Second Hague Conference, spoke against it; see Wehberg, *Kommentar*, p. 52. Recently van Eysinga came out in favour of Vollenhoven's idea in the *Zeitschrift für Völkerrecht und Bundesstaatsrecht*, 1911, pp. 5–6, as also the book by de Jong van Beek en Donk, *In't Zicht der derde Vredesconferentie*, Dordrecht, 1911.

national flag, that is, the flag of the community of states, as a sign of its character, obligates itself to place all the harbours and roadsteads of the state and of its colonies at the disposition of this squadron at the request of its commander, in order that they may serve as a base of military operations, provided that none of these harbours and roadsteads are at the time in the judgment of the government indispensably needed for national purposes.

After this declaration of principle, thinks Vollenhoven, the Third Hague Conference must undertake :

(*a*) To lay down a simple and appropriate rule for the command of the international fleet which is composed of the forces of several nations.

(*b*) To prescribe that the permission to fly the international flag shall only be conferred by a decree of the said international court.

(*c*) To prescribe that the requests in cases 1 and 2 shall be directed to the International Bureau of the Court of Arbitration, which will immediately communicate them to all the states.

(*d*) To extend Articles 61 and 62 of the Declaration of London of February 26, 1909,[1] to the flying of the international flag.

(*e*) To prescribe that services which are rendered to the ships of the international fleet may never be regarded as an unfriendly act nor as a violation of neutrality, and that these ships shall enjoy certain privileges.

[1] Article 61 of the Declaration of London relates to the special position of those neutral ships which sail under convoy of a ship of war, and Article 62 regulates the control over a possible deception of the captain of the convoy ship by the neutral transport ship.

The international fleet which is here proposed by Vollenhoven as an instrument of international execution shall, however, enter upon its functions merely in the two above-mentioned cases of resistance to an award of an international court and of the violation of neutrality by a belligerent, and it shall otherwise have no right to act. Following the same principles, an analogous international executive army is to be formed on land.

So far Vollenhoven. We refrain in this place from entering upon a discussion of the details of this proposal; it is sufficient to have made it clear that even in this direction the science of international law is beginning to let itself be influenced by the ideas of the pacifists, and that the realization of these ideas would be of great value, and that they could come about without necessitating any fundamental change in the structure of the international union. Once these ideas have come to prevail, the political difficulties which at present oppose the establishment of an international executive will at the same time disappear and men will gradually become convinced that in this case also the progress of the civilized states as a body must be of direct advantage to each one of them. However, this development will require some time, and it appears to us certain that the leading powers, with the exception of the United States of North America,[1] will not yet be ready at the time of the Third Hague Conference to agree to the

[1] This country likewise takes a very progressive attitude on the question of an international executive. The *Berliner Tageblatt* published, in no. 623 of December 7, 1911, an interview of its correspondent with President Taft in which the President said that as soon as a sufficient number of obligatory arbitration treaties were concluded it would be possible to establish an international court of justice which must also be furnished with the necessary executive power in order to make its award binding.

establishment of such an international executive.[1] And doubtless the partisans of this idea will do better to postpone their project for the present, since this is a 'time when the efforts for the further development of arbitration and international organization need the greatest and, if they are to bring forth fruit, the most tender cultivation' (Wehberg). Naturally that does not prevent scholars from having the right and indeed the duty of studying this problem. For its realization would greatly further the progress of law, and, as Nippold said on one occasion, it is the task of jurists to win our statesmen to progressive ideas of law.

Section 3. The World Parliament

The organization of the Hague international union in the form of a world federation will also make possible the attainment of another aim of the pacifists, namely, the creation of a parliament representative of the civilized nations, which would meet at the same time as the Hague Conferences and which would properly be composed of delegations from the parliaments of the contracting

[1] Jarousse de Sillac appears to be of the same opinion when he speaks as follows upon the question of the executive: 'It goes without saying that the future will decide whether it is feasible to seek to obtain means of enforcing respect for international laws. But for the present it is useless to speculate too far in advance. All that we can assert just now is that force should be put more and more at the service of international law. In this connexion we need only observe the evolution of this practice to see its tendency. The creation of international forces on several occasions is a purely modern phenomenon: the expedition to China, the occupation of Crete, the placing of gendarmes in Macedonia, &c. The method has been found. When neutral states shall have come to be conscious of their position, when the habit of taking second thought on the eve of a conflict has been developed, the moral force which will result therefrom will only be the prelude to the material force at its disposal.'

states.[1] If on the one hand a whole group of projects for the reorganization of Germany during the fifties and sixties of the last century cling closely to the federation as the type of the union, yet on the other hand they also endeavour to create a national assembly as an organ of the German federation. Thus the Munich draft of a federal constitution of February 27, 1850, called for a parliament consisting of 300 members chosen from among the members of the various state assemblies, who were to have the right to pass upon common laws as well as the right of initiative.[2]

[1] Here also we refrain from giving a complete history of the development of this pacifist idea and limit ourselves to stating that here again the Americans have taken the lead, and with Bartholdt as their spokesman came forward at the Interparliamentary Conference at Brussels in the year 1905 with the proposal that the project of a world parliament be submitted to the Second Hague Conference. The proposal led first of all to the creation within the Interparliamentary Union of a so-called reorganization commission which was commissioned to propose for the Interparliamentary Union itself a system of apportionment of votes among the parliaments of the different countries. Nippold (*Die Fortbildung des Verfahrens in völkerrechtlichen Streitigkeiten*, p. 544) thinks that the above proposal has no fixed connexion with existing institutions or with practical life, and that from the point of view of present public law the plan is Utopian in character. But Nippold is judging from his point of view that the Hague Conferences were international law conferences of an entirely non-political character, whereas, as we have seen, they constitute the beginning of a political organization of the civilized world. The idea that in a federation such as the Hague union, even in its loose form, delegates from the parliaments of the contracting states could meet in connexion with the representatives of the governments is also advanced by Jellinek in his *Lehre von den Staatenverbindungen*, p. 186, and he is in accord with Zöpfl, Waitz, and Bluntschli. Moreover, Bluntschli, in his project in 1878 for the organization of a European union of states, proposed a European parliament side by side with the Bundesrat; see my *Organisation der Welt*, p. 63. This proposal is now naturally enlarged into that of a world parliament.

[2] Concerning this draft see von Kaltenborn, *Geschichte der deutschen Bundesverhältnisse*, vol. ii, p. 187 et seq.

The same idea was contained in the Saxon reform project of 1861.[1] But the Austrian programme of the Frankfort Diet of 1863 in particular contains detailed provisions of this character.[2] Although what was intended here was merely a union of 'Equal and independent sovereigns', and accordingly a federation, yet by the side of the federal organs appointed by the princes there was to be created an assembly elected by the parliaments of the states and consisting of 300 federal delegates. These delegates of the parliaments were not to be subject to binding instructions from the bodies electing them, and they were therefore to be just as little bound by commissions and instructions as other parliamentary representatives who sit in a common assembly and vote as individuals. Even in the German Zollverein, which is to be distinguished from a federation only by its non-political character,[3] since it had merely an economic object in view, there was, as is well known, a Zollparlament from 1867–71. That the delegates to the world parliament would have to be appointed by the parliaments of the several states and not elected directly by the citizens of the various states, whereas the Zollparlament was elected by a direct vote in the South German states in accordance with the same electoral franchise which prevailed within the North German Confederation, follows as a direct consequence from the differences of political and cultural conditions within the states belonging to the world federation. In like manner a direct electoral franchise for the world parliament, which could hold good

[1] See the *Staatsarchiv*, vol. i, no. 164.

[2] See Article 16, sec. iii, of the said draft, which is printed in the *Staatsarchiv*, vol. viii, no. 1760.

[3] Jellinek (op. cit., p. 170) thinks, it is true, that the Zollverein, apart from its non-political character, lacked the permanence of aim necessary to a federation, since it was expressly limited to a period of twelve years.

on the one hand for states like France and Germany and on the other hand for Turkey, Persia,[1] and China, and which would in all cases be an adequate expression of the political forces prevailing in the state, would be properly rejected by those who think it a right and natural demand that the electoral franchise for the Reichstag be applied to Prussia. If, therefore, a world parliament composed of delegates of the individual states of the union appears to be quite in keeping with the whole organization of the Hague union, there is the further question to be answered whether we can promise ourselves that the work of The Hague would be essentially furthered if a world parliament were to meet side by side with a periodic conference of states. And to this question we do not hesitate to give a decisively affirmative answer. Pacifism has, like Christianity, like national and social ideals and a thousand other living forces, proceeded from the people and not grown up in the cabinets of ministers; on the contrary, official diplomacy is at the present day frequently just as much opposed to it as were the diplomats of the individual German states at one time to the demand for a great united German nation.[2] Professional diplomacy works under far too many restrictions to be able to carry through by itself the work of the organ-

[1] Presupposing that Persia will have a place with the other states; see what has been said above on this point.

[2] How much more progressive in respect to the avoidance of war is public opinion than official diplomacy is again manifested in the recent Italian campaign against Turkey, which was condemned by the whole civilized world but was permitted by diplomacy, and that simply because the governments of each state sought to draw some special advantage from it. France had already promised sufferance in return for the support of Italy at Algeciras, Germany did not wish to have her relations with Italy disturbed, and England hoped that German influence at Constantinople would be weaker if Italy, the ally of Germany, attacked the Turks, &c.

ization of the civilized world.[1] Within the last few decades the impression has often been produced, and it has in my mind both its tragic and its comic sides, that, when war has been about to break out and all sensible persons on both sides were agreed that an understanding must be reached, the diplomats, as the saying goes, 'could not yet find a basis of agreement,' and in the meantime millions were lost upon the stock exchanges and the whole economic life crippled! It is characteristic of our time that the governed, who have already obtained with the help of parliamentary institutions a decisive influence in domestic politics, are now seeking by means of publicity committees, &c., to exercise an influence over foreign politics, and it seems to me it can only serve to bring nations closer together if the Hague union also were to take into account these efforts. It was not without reason that, as has been said above, in all the projects for the reorganization of the deplorable conditions of the old German Confederation, a national parliament was proposed, because it was seen that such a parliament would furnish the force needed to overcome the difficulties and differences of opinion common to diplomats as representatives of states. Even now it seems to me probable that obligatory arbitration would have been adopted at the Second Hague Conference for certain subjects in case an overwhelming majority of the world parliament, including a majority of the German

[1] See the excellent chapter in Schlief's book, *Die Diplomatie und der Friede*, p. 214. Monarchs, it is true, have, even less than diplomats, been unable in our times to secure peace between the nations by their personal relations with one another. Consider the numerous visits made by them in recent years with a formal kiss upon both cheeks, and yet international crises continue to arise which bring us face to face with a world war. But monarchs can, as the personality of William II proves, in critical moments influence their own statesmen in favour of peace.

delegation, had declared itself in favour of this idea. For if in this way it had been made clear that the German Government in its unflinching opposition had not even its own parliament behind it, it would evidently have been obliged to yield. How important the legislative initiative of the world parliament would be for the development of international law is best evident from the excellent work which has been done for years by the Interparliamentary Union, although it has thus far been purely private in character. In this connexion we refer merely to the fact that the fifth Interparliamentary Conference at The Hague in 1894 for the first time passed a resolution to prepare a project for the organization of an international arbitration tribunal, and that as a result of this resolution the celebrated memorandum of the Belgian senator, Chevalier Descamps, was presented to the Interparliamentary Conference of 1895 and was then sent to the governments, and thus in a certain sense became the basis for all further official action.[1] But the existence of a world parliament will, even from another point of view, produce the most beneficial results. As is pointed out by Jellinek in the conclusion of his interesting study upon the 'Battle between the old and the new law',[2] the future development of law will be marked by the battle between national and international law. In this contest not only will the above-

[1] Upon the Interparliamentary Conference of 1894, see Bertha von Suttner, *Die Haager Friedensconferenz*, 2nd ed., 1901, p. 74 et seq. Descamps was later president of the committee of examination of the arbitration commission and the author of the brilliant report made by the commission to the Conference. That the work of The Hague, in so far as it relates to the permanent court of arbitration, deviates in many important points from the resolutions of the Interparliamentary Union is at the same time not to be denied.

[2] Heidelberg, 1907, Inaugural Address.

mentioned case be possible, that the world parliament will overcome the opposition of an individual reluctant government, especially when the delegation of the said government belongs to the majority in the world parliament, but on the other hand it would also be possible in this way to break down the opposition offered by a nationalistic parliament to the progressive attitude of its own government. For since the governments belonging to the organized world federation are in every case republican or constitutional in character,[1] it is not enough that the representatives sent by the executive department to an international conference at The Hague be in accord, but in all important matters the government of each individual state will be bound by the approval of its own parliament, and in consequence in each state the case may occur in which a national opposition to the new international rules may make itself felt. Such cases have already repeatedly arisen. We need only recall the political contests which took place recently over the Declaration of London of 1909. It was, indeed, the English Government which brought about the adoption of the Declaration, but the opposition partly raised a protest against it, not only in its press but also in parliament. In countries such as England where the government is only a committee of the majority in parliament at the time, it will, it is true, be always able to overcome the opposition in its parliament as happened in this instance as well.[2] But it is otherwise when the government and the majority in parliament are more or less independent, as is the case not only under the German

[1] Siam, at the most, may constitute an exception.

[2] The opposition which still exists in the House of Lords can, as has already been said in other connexion, only temporarily prevent the adoption of the bill.

constitutional system but also in republican states with a strict separation of powers, e.g., in the United States of America. In this case it is conceivable that the organs of the executive department might subsequently find that the parliamentary forces of the country were simply unwilling to co-operate in respect to the concessions which national law must make to international law.[1] Such conflict of opinion between the executive and legislative departments in respect to the problems of internationalism can not only render futile the whole work of future conferences but can also throw a very unfortunate apple of discord into the domestic life of the state. Accordingly, it would be actually much better if from the start a delegation from the home parliament were invited to co-operate with the world parliament in the legislative functions of the world federation. For this delegation would be as a rule the exponent of the political forces controlling the parliamentary institutions of the individual state, and although the delegations could not be bound by the instructions of their parliaments, nor could the several parliaments be bound by the acts of their delegations, yet the delegation would as a rule represent the presumed will of the parliament sending it, and the parliament would later follow the action taken by its delegation. In this way, accordingly, there would be

[1] I recall, e.g., how the first general arbitration treaty of 1897 between Great Britain and the United States was rejected by the Senate for want of six votes which were necessary to make up the two-thirds majority required for treaties. See Fried, *Handbuch der Friedensbewegung*, 1905, p. 114. So also more recently the necessary majority in the American Senate for the adoption of the arbitration treaties concluded by President Taft with Great Britain and France was only obtained after the government had made certain concessions which were of a character to lessen considerably the value of the said treaties. See the article which is to appear in the *Friedenswarte*, 1912, pt. iv, by Senator E. Burton of Ohio, who himself helped to bring about the adoption of the treaty.

a certain guarantee that a conflict of opinion between the executive and legislative departments would be avoided in advance. Nay, if all the individual states which belong to the world federation were represented each by its own delegation in a world parliament which should meet by the side of the conference of states, we may imagine a later stage of development of the international organization in which the resolutions of international conference and world parliament would be *ipso facto* binding, and would no longer need either ratification or sanction in the individual states, but only publication. Such a situation, provided it be based merely upon a denunciable treaty, would be in no way inconsistent with the nature of the federation of states,[1] and has already been reached in the German Zollverein, an international administrative union entered into for a period of twelve years and lasting from 1867–71.[2] How close the association between the states of the world federation might become to correspond with the progressive needs of an international intercourse which is daily increasing in importance is best shown by the ideas upon federal government advanced by John C. Calhoun, the celebrated champion of the Southern states in the American constitutional conflict,[3] which Max von Seydel vainly endeavoured to transfer to the new German Empire. It was upon these ideas that the confederation of the seceding states was based, so that they were actually realized for a certain period, and we cannot say whether this federation would have possessed intrinsic vitality had it been able to

[1] See Jellinek's *Lehre von den Staatenverbindungen*, p. 169.

[2] See Article 7 of the treaty of July 8, 1867, creating the Zollverein.

[3] The theories of Calhoun are developed in his 'Discourse on the Constitution and Government of the United States', a brief analysis of which is to be found in Jellinek, *Staatenverbindungen*, p. 187 et seq.

hold out against the superior power of the union. The federal government, in Calhoun's theory, through its central organs exercises within a certain field legislative as well as administrative and judicial functions, operating directly upon the citizens of the several states. But the federal organs exercise merely delegated powers conferred by the contractual act of the states. The individual states retain not only the exercise of their 'reserved powers', but they are the ultimate source of all power, and as the possessors of all reserved powers they can make their sovereignty effective by secession. We see, then, that the world federation is a form of international organization which, without encroaching upon the sovereignty of the individual states, can within a not distant future satisfy all the needs of international life. If the federation is, according to Calhoun, a form of state association which, 'so long as no more serious conflict goes on within it, is as a practical matter scarcely to be distinguished from a federal state' (Jellinek),[1] the transition to a universal federal state could in this way be gradually accomplished, supposing that international life should later demand this transition. For the idea of sovereignty which would thus be abandoned is only a political dogma born of the struggle against the universal monarchy of emperor and pope. Whether this idea will continue to prove sufficiently strong to prevent under wholly different conditions of fact a republican organization of the world which should be based upon the principle of the legal equality of its member states, which of us can say at the present hour. For myself I can conceive of a development in which the individual states would even be ready, in the interest of the whole body, to exchange their individual sovereignty for a share in the

[1] Op. cit., p. 188.

sovereignty over the whole body, as has been done in a smaller way by the states of North America, of Switzerland, and of the present German Empire. But as we have said elsewhere, we can only speak in this matter from belief, not from knowledge.

For the present we must content ourselves with the assertion that the establishment of a world parliament is greatly to be desired. But to endow it with a legislative power of its own, such as was possessed by the German Zollverein from 1867–70 and by Calhoun's federal government, is not expedient within the near future, and its acts should rather require the sanction of the individual member states. But even if we assign to it this modest position, the world parliament will not be established by the Third Hague Conference. The diplomacy of the civilized world is at present so little accustomed to work in the open that it will not be so easily persuaded to call in a world parliament to assist it in its work at the Hague Conferences. In order to bring that about, public opinion must exert far greater pressure in that direction. Here, then, is in my opinion the task of jurisprudence, to fight for the progress of law and to direct public opinion in the right paths. The difficult question, how the votes in the world parliament would be apportioned, i. e., as was said above, how many votes would be assigned to the delegation from the parliament of a given state, does not come within the scope of this work, which is intended merely to point out the problems, and can be left unsettled. This question must first be settled for the Interparliamentary Union,[1] which may at the present day be described as a sort of semi-official world parliament, since by reason of its distinguished

[1] Concerning the reorganization commission appointed for this purpose, see above, p. 305, note 1.

political position it even now receives from the more important states an official pecuniary subsidy.[1] From among the Interparliamentarians there have already appeared important contributions to its solution which deserve the fullest consideration on the part of the science of international law.[2] The better the Interparliamentary Union succeeds in regulating its own organization the easier it will be later on to convert that institution from a semi-official into an official one.

Section 4. International Administration

The world federation must be further developed by extending its activities to the field of administration. In connexion with Article III of the statute of the international union drafted by us above we have already pointed out that the constitutional powers of the union must include the right to establish from the start international administrative institutions. The need of such institutions is, as we have already said, sufficiently evident from the existence of all those international administrative unions which in point of origin preceded the work of The Hague. International administrative institutions are therefore older than the judicial institutions, and the problem now arises how the diverse organizations are to be united together. On this point there can be no doubt that the judicial organization created by the Hague Conferences is destined to take over the administrative unions. For, as we have shown, this judicial organization is by reason of its purpose

[1] See the list of subventions given in the *Annuaire* of the Union for 1911, p. 89. The German Empire for its part pays a contribution of 5,000 marks.

[2] I refer here to the careful study by Ludwig Quidde, *Zur Organisation der interparlamentarischen Union*, separate impression from the *Friedenswarte*, XIII, pt. 6–8, and published by the *Friedenswarte*, Berlin, 1911.

a political union, which is suited by its nature to maintain administrative agencies. The discussion of the question how the various international special unions are to be brought into connexion with the work of The Hague has already begun among students of international law,[1] but for practical reasons it seems to me that it would be better in this case also not to anticipate the natural development. There must first be a general recognition of the fact that by the work of The Hague we have already a political union of states, and the Third Hague Conference must then give this union its constitution, before the necessary basis will be laid upon which the transfer of the old administrative unions to the Hague organization can be made. So long as The Hague work has not yet obtained official recognition as a political union of states, so long as the existence of an authority on the part of the states as a body has not yet been understood, it is in my opinion a more or less idle question to examine how the other international agencies are to be merged into the authority of the world-federation. But as soon as the work of The Hague has been declared in a fundamental treaty to be an international union for general purposes, it will become in the highest degree desirable to transfer the international special unions over to this international union. For by so doing a new and powerful impetus would be given to its growth and prosperity. In this case, as in that of every other political organization, the regard held for it will be dependent upon what it does for civilization. If, therefore, the Hague international union should enter upon the heritage of all the administrative unions it would exercise from the start

[1] See the project of a world bureau mentioned above on p. 250, note 1, and the article upon it by Perrinjaquet in the *Revue générale*, 1911, p. 216 et seq.

a very fruitful activity, which must have the effect of bringing the members of the union closer together. This will in turn necessitate the development of the political institutions and greatly facilitate the attainment of the political ends of the union in the maintenance of peace through law.

For similar political reasons it would have to be urged on all sides that, as soon as the Hague international union has once become officially constituted, no new special international unions of a wholly independent character should thenceforth be founded, prescinding entirely from the fact that such institutions would entail an unnecessary expenditure of time, money and energy, as I have already repeatedly said.[1] It has also been several times pointed out that it would not be necessary either for the transfer of the existing separate administrative unions to the world federation, nor for the establishment by the world federation of new administrative institutions, that all the members of the union should take part in them; and the case of the Prize Court was referred to as an instance. It must be left to the future to show what new institutions for administrative purposes the world federation will create for itself. That there will be no lack of needs is assured us by the increasing closeness of international relations both in point of commerce and of intercourse. A brief reference may here be given to two more or less acute present needs of international administration, which belong to entirely different fields. First, the necessity of a world law protecting patents and trade-marks, which can only be satisfied by new international agencies,[2] and secondly, the necessity

[1] See above, p. 250, and my *Organisation der Welt*, p. 81.

[2] In my *Organisation der Welt*, p. 74, I have already referred to the necessity of a world patent right in connexion with an article by

of an international police. With respect to the latter there can be no doubt that criminal acts, as practised upon an international scale, have far outrun their pursuers. Just as we have an international life which manifests itself in international trains, in international health resorts and international hotels, so we have international criminals who pick pockets in through-trains, steal in hotels, &c., or who as gamblers assume a gentlemanly demeanour and by their tricks prey upon innocent victims, shifting their activities now to St. Moritz, now to Calcutta or the oasis of Biscra. How much easier it would be to get rid of these unclean elements if we had an international police force which in pursuing criminals could transfer its activities from one country to another, just as those skilled law-breakers do who know how to put to use all the advantages of modern means of travel. In that case all the branches of such an international police would be centralized.

A. du Bois-Reymond in the memorial volume to Kohler. Such a right would not make it necessary, however, that the ten leading states or even more should adopt the same tests, at the cost of the inventor.

CONCLUSION

THE EFFECTS OF THE NEW SYSTEM

We believe that we have now shown that the beginnings of a political organization of the civilized world and, in consequence, of an international law of peace are already at hand; and we believe, moreover, that we have indicated the manner in which this system of law and regulation of peace is to be developed. In conclusion, it merely remains for us to view the results which the whole development must produce in order to perceive what fruit is to be expected from it. It is true that in view of the imperfection of all earthly things the actual use of force between states will never be entirely prevented, just as we still experience a resort to force between individuals and violent opposition on the part of the citizens against the laws of the state; but war will cease to be a legal institution as soon as the states constituting the world federation shall have bowed to the rule of law in their foreign relations, as they have done in their domestic affairs by the establishment of constitutions. And if one is inclined to use his reasoning powers he must agree that the idea of war as a legal institution is the most inconsistent one that can be imagined. For war is based upon force, while law is based upon the moral idea of justice. If civilization developed along lines of strict logic the furor of war would never have been covered over with the mantle of law! But, as an actual fact, civilization does not advance without such contradictions, and it was after all by taking a liberty with

legal principles that we have since the time of Hugo Grotius regarded war as international legal procedure. But with the disappearance of war as a legal institution there will also disappear the situation of armed peace, which in reality is only an armistice and which as a permanent situation is perhaps worse than war itself. For war can in the nature of things be only a temporary phenomenon and, by reason of the demands which it would make in our times, could never again last for thirty years. But whatever progress is made in respect to the development of the world federation must help to close up that permanent international breach which creates the rivalry in armaments, which in turn, following the fatal vicious circle, increases the mutual distrust between the nations. If the problem of the limitation of armaments, to which the Hague Conferences really owe their existence, is to be attacked at its roots, the work of The Hague must be further developed.[1] And it will be the realization of this which will help to bring about that development much more quickly than the enemies and the critics of the great moral movement of pacifism think. For the problem of the limitation of armaments becomes daily more important and will soon push all other questions of international political life into the background. It is true that various factors have co-operated to prevent this question from being understood

[1] The idea that the international basic treaty with a guarantee clause would also be the best foundation for a general limitation of armaments is excellently brought out by Schlief, op. cit., p. 450 et seq. Later, one of the leading German pacifists, the well-known clergyman of Stuttgart, O. Umfried—in my opinion it is a good sign for the peace movement that its German representatives are to be found particularly in Swabia, 'the land of genius,'—distinguished himself in propagating this idea. Of his numerous publications upon this subject I refer here only to the last pamphlet, *Rüstungsstillstand*, Esslingen, 1911.

as yet by us Germans in its full bearing.[1] First of all there is our national history. The history of the German nation has been for more than six hundred years a history of suffering, as Bismarck so pointedly said at the opening of the North German Reichstag. And the weakness of the political structure of Germany has been taken advantage of by the other states to the full. For centuries the German soil was drenched with German blood in resisting foreign conquerors. As Bismarck said with respect to the last Franco-Prussian war, there are families in Germany in which for centuries each generation has shouldered the musket to defend the fatherland against France. But England reaps in a certain sense what she has sown, when she believes herself forced by us to strengthen continually her naval armaments. Consider how at the time of the

[1] So far as I know I am the first professor of international law in the German Empire to have expressed himself directly in favour of a limitation of armaments by treaty; see my *Organisation der Welt* in the ed. of 1909, p. 74 et seq. Nippold also justly ridicules the 'peculiarly intelligent form of the modern rivalry in armaments', and recommends limiting them by treaty; but, as was shown above, he represents the view, which in my opinion is a mistaken one, that the problem of the limitation of armaments must be separated entirely from the Hague Conferences and handled by itself, and my fear is that very little would be accomplished in that way. See Nippold, *Die zweite Haager Friedenskonferenz*, vol. ii, p. 259 et seq. It is gratifying that H. Wehberg, who has now for two years been studying the question of the limitation of armaments, has on several occasions expressed himself in a progressive sense, and promises us a special and detailed study of the question which will include a consideration of the thirty-five proposals which have thus far been presented upon this subject. That is certainly a better way to act than if the German science of international law should join with Zorn in pronouncing the problem as simply unsolvable and classing it with the 'Utopian schemes of the pacifists'. See Zorn in the memorial volume to Güterbock, p. 211, and the excellent article by Wehberg, 'The Question of Armaments in the Progress of the Times,' in the *Friedenswarte*, 1912, pt. iii, p. 91 et seq.

German Confederation Lord Palmerston ventured to say that England would not recognize the German flag, how England intrigued in the Schleswig-Holstein question in order to prevent us from obtaining for our navy such an excellent harbour as that of Kiel, and finally how when the new empire became a colonial power and took possession of unoccupied territory in a manner absolutely incontestable at international law, there was heard in England in authoritative circles the infamous word: 'Hands off Africa.' Our delivery from these grievous humiliations and wrongs lasting through centuries we owe to the Prussian military state. No wonder then that the cry of the German patriots to-day is: 'Armaments, armaments, and more armaments.' But in the meantime the fanatics for armaments overlook two things: first, the greatness of the sacrifice, and secondly, its relative uselessness. According to the official report of the secretary of the imperial treasury, the military expenditures of the empire, including the cost of military pensions and the interest on loans made for military purposes, amount yearly to 1,558 million marks, and now the new army and navy plans propose an additional yearly expenditure of up to 127 million. That would amount to a total of 1,685 million—that is, more than one and two-thirds billion marks. And how far may we expect a further increase of these expenditures, if no agreement is reached between the states? In this connexion I may refer to the fact that when the present secretary of the imperial navy introduced, in the year 1897, his first great navy law, he calculated that in the year 1903–4 his budget of 150 million yearly would have reached the highest mark. At the present day the budget of the same secretary amounts to not less than three times this figure, and a further increase of from fifteen to forty-three million

has been agreed upon for the future.[1] Can it still be said, as it was by the German military delegate, Colonel Gross von Schwarzhoff, during the discussion over the problem of the limitation of armaments at the First Hague Conference,[2] that 'the German nation is not oppressed by the burden of taxes and assessments; it is not on the edge of the precipice; it is not facing exhaustion and collapse. Quite the contrary: the public and private wealth is increasing, and general prosperity, the standard of living, is advancing every year'.[3] I have already referred in another work [4] to the fact that in spite of all the economic impetus in Germany due to the condition of our imperial

[1] The conviction prevailing in Germany of the necessity of so strong a fleet can no longer stand up against a recognition of the fact that we are the driving factor in respect to naval armaments, and that we are forcing England to make larger and larger outlays if she is to maintain her superiority at sea. For five years the budget for our fleet amounted to 278,000,000 marks as against 641,000,000 for the British, while last year, as has been said, our budget reached 450 million as against 905·6 for the British. Where will all this stop? Ten years ago the powers declared that war-ships of 14,500 tons marked the last increase in size. To-day we have reached ships of 25,000 tons, and there is talk of ships of 30,000 tons for the future. In the year 1883 the yearly expenditure for the armed peace amounted in Europe alone to 4 billion francs, in 1908 to almost 8 billion. That means in twenty-five years 150 billion for Europe alone. See the pamphlet by Baron d'Estournelles de Constant, *Limitation of Expenditures upon Land and Naval Armaments*, published by the Interparliamentry Union, Brussels and Leipzig, 1912.

[2] See the report of the proceedings given in Meurer, op. cit., vol. ii, p. 586 et seq.

[3] On the other hand, Léon Bourgeois rightly pointed out that he also was the representative of a rich country which was in no way breaking under the burden of armaments, 'but that they had not come together to advance the interests of one country over those of another, but to consider the welfare of mankind as a whole, and that it could not be denied that the civilized world was suffering from the excesses of the rivalry in armaments.'

[4] See my *Organisation der Welt*, p. 75.

finances we can scarcely speak of a growth of the public wealth; the Empire as such is continually in financial difficulties; and so fundamentally conservative a statesman as Count Posadowsky justly stated a few weeks ago in the Reichstag that it was utterly impossible to come before the people every two years with new demands for higher taxes.[1] If, nevertheless, thus far, as Zorn says,[2] the idea of the limitation of armaments is scarcely accepted by us in Germany, that is due not only to the above-mentioned reasons drawn from our national history, but to the more essential factor that the leading social and political classes have thus far succeeded in placing these great expenditures of the Empire upon the shoulders of the general public. If we had a democratic government which imposed upon the upper classes a yearly inheritance tax of 500 million marks, so that these classes were forced to experience in their own persons a partial confiscation of their property, there would be a much greater understanding on the part of the upper circles in Germany of the problem of the limitation of armaments.[3] It depends entirely upon whether these expenditures be viewed from the standpoint of the prosperous business man or from that of the more or less impecunious masses. We concede naturally that no one is so poor as not to have the greatest interest in the

[1] The consequences of such repeated demands for taxes are an ever deeper distrust on the part of the masses against the manner in which the affairs of state are conducted, and a growing domestic breach in consequence of the quarrel as to who shall bear the new burdens.

[2] Zorn, *Das deutsche Reich und die internationale Schiedsgerichtsbarkeit*, p. 9.

[3] The fact that the wealthy classes, in comparison with those less well off, do not contribute sufficiently to the burdens of the Empire was stated by very conservative political economists on the occasion of the recent reform of the imperial finances.

defence of his country, but notwithstanding this, the sacrifices which must be made to this end in time of peace will be felt more by the poorer masses than by the wealthy. It is true that the standard of life of this largest class is improving. But how far are they still behind what is to be wished for them in the interest of humanity! This brings us to the consideration expressed above, that the sacrifices of the present system of armed peace are perhaps harder than those entailed by war. We have in Germany an infant mortality of 350,000; every year 35,000 women die in child-birth;[1] more than 600,000 people in Berlin live in dwellings in which more than five persons are crowded into a single room; the larger part of the school children suffer from lack of nourishment. All these are sad conditions when we keep before our eyes the ideal that every man should live as befits a human being.[2] Science tells us that if by means of social relief we could reduce infant mortality to the figures for Norway, 200,000 lives would be saved every year;[3] science tells us that it would be possible in thirty or forty years practically to exter-

[1] There can be no question that a great part of these women could be saved by proper social relief; nevertheless, in the imperial district of Gumbinnen, e.g., 42 per cent. of the children come into the world without the help of a midwife, and yet in the reform of the workingmen's insurance the inclusion of the services of a midwife among the objects of the insurance was rejected for lack of means.

[2] At the present day the nationalists are in the habit of calling a man a demagogue if he compares statistics of the above kind with the figures for armaments. That is, of course, a very easy way of disposing of things, just as the ostrich sticks its head in the sand.

[3] Compare the number of lives which could be saved yearly by combating infant mortality alone with the fact that the entire war of 1870–1 cost us only 40,000 men. The political economists have thus far troubled themselves much too little with these noteworthy facts, because the idea of human economy receives much too little consideration with us.

minate tuberculosis, our devastating national disease, and to solve in large part the social problem by means of public measures for the improvement of lodgings—but money is lacking for all these humanitarian objects. The burden of taxes is traditional; we are accustomed to bear it and will continue to do so, but they must be spent in great part upon armaments.[1] Even if we regard the army and navy as the great educational institution for the entire nation, the positive benefits of which contribute to the prosperity of the state in time of peace,[2] is it therefore necessary that the dreadnoughts, which the civilized nations rival one another in building, should assume more and more fantastic

[1] Our nationalists point, on the other hand, to the benefits resulting from our workingmen's insurance. Unquestionably these benefits deserve the highest praise, but the heavy assessments in consequence must for the most part be contributed by the beneficiaries themselves. In 1909 the round sum of 810,000,000 marks was paid out, but of this sum the employers contributed 415,000,000, the working-men 343,000,000, and the Empire only 51,000,000. The entire expenditure of the Empire for public insurance amounted, therefore, to about as much as the cost of a single dreadnought. It is true that under the new insurance act the amount will be increased, because the Empire will for the future have to pay a contribution to the widows' and orphans' pensions, but at present this contribution is a very modest one, and the grant of old-age pensions at sixty-five instead of seventy years is withheld because the Empire could not raise the necessary nine million marks yearly. This shows us in the clearest way how greatly the material development of workingmen's insurance is dependent upon a restriction of the expenditure upon armaments.

[2] This view is advanced by Zorn, op. cit., p. 9. Naturally, as is the case with all other human institutions, the positive benefits of compulsory military service are accompanied by certain drawbacks. The one which I regard most serious, the fact that the organization of reserve officers and of military clubs restricts citizens in the exercise of their rights of citizenship instead of educating them to be free and self-dependent, I consider, however, to be merely a temporary phenomenon. Even in the case of the Prussian military state the time will come when the army will be really incorporated with the state.

dimensions, so that finally each battleship costs fifty million marks, and before it is completed, it is surpassed by a larger type. If, according to the proposal of the King of Italy, an international agreement should be reached fixing a maximum displacement for dreadnoughts, would the educative effect of compulsory military service be lessened thereby in the slightest degree ? Rather would it not then be possible to carry out Zorn's fully justified wish that all those capable of bearing arms should be enrolled into the army, in order to give them the advantages of this training? And is it not conceivable that on the one hand all persons capable of bearing arms should be enrolled into the army, and that on the other hand the total size of the army should be limited by treaty, by rewarding greater military ability with a further shortening of the period of service?

Enough has been said to justify our opinion that the sacrifices entailed by the rivalry in armaments should make the problem of the conventional limitation of armaments one of concern to us Germans also. This conviction is strengthened by the impression that the present system fulfils only very incompletely its object of securing peace. It must be again and again emphasized that the preparations for war which are the result of the international breach only serve to increase it to an intolerable degree. No nation feels secure with regard to the others, and whereas in recent years there was for a time no family in England which did not believe that Germany was about to fall upon England in order to rob her of her colonies, there now prevails very widely in Germany the belief that England is planning to make a sudden attack upon our fleet and annihilate it. Truly a wretched situation, for the removal of which the German science of international law must help to prepare the way. For we Germans

experience precisely from these existing conditions the strange result that while we are so strong from a military point of view, we are diplomatically very weak. We have the largest army in the world and the second largest fleet, but precisely for this reason we are forced from the leadership in the great international questions and condemned to adopt a more or less defensive policy. And the reason for this lies simply in the fact that the defensive policy of our armaments is very unjustly distrusted,[1] and in consequence we are encircled on all sides. And as, when our vital interests are not endangered, we are much too peace-loving to strike out and break through this ring by force, our success in questions of foreign affairs has been much more modest than our military position would lead one to expect.[2] Whichever way we look at things, therefore, whether it be from the standpoint of a more favourable condition of our imperial finances, or from that of a more comprehensive social relief,[3] or from that of a more successful

[1] The publicist, Friedrich Dernburg, who died recently, formulated his impression of the international situation apropos of the trouble in Morocco in the following terms: 'No one believed that we were so friendly, because we were so strong.'

[2] Consider the outcome of the Morocco affair. England made no secret of the fact that she would not tolerate our becoming established in southern Morocco, because it was feared that we should thereby create a military position in the Mediterranean; moreover, the English protest against the cession by France of a strip along the west coast of Africa was founded, according to so good an authority on world politics as Professor Rohrbach, in the fear that Germany, in the event of a maritime war with England, would be enabled thereby to prevent England from obtaining supplies of wheat from Argentine. Thus on all sides the fear of the great war is the drop of poison put into every cup. And the manner in which England was led, by reason of this fear, to oppose us in the Morocco affair has naturally served to widen the breach.

[3] It is an interesting fact that in the discussions at the First Hague Conference upon the limitation of armaments the German military

foreign policy, we are brought face to face with the problem of the limitation of armaments. And this problem, as we have said above, can only be fully and radically solved by proceeding earnestly with the development of the world federation.

> The powers must finally become associates instead of competitors ; they must form a trust among themselves, they must recognize the existing situation and bind themselves not to seek to disturb it by force of arms. . . . Then it must be determined what each nation must contribute, on the basis of its financial resources, to the general fund for the protection of the whole body . . . and these contributions must not be something dependent upon the will of the individual state, to be increased or diminished by it without consideration of the others, but something which is to be collected from each state as its obligation towards the whole body, as its quota towards their common protection. This would give armaments another character, and from that time on a reduction would be possible and we could move in the opposite direction ; the nations could come to an agreement by which the common burdens could be proportionately alleviated. Armaments would then have a more international character, and while national armaments would be regarded only by the state itself as a protection but by others as a threat, the truly international armaments would be, in the full sense of the word, merely the protection and the bulwark of peace.[1]

delegate, Gross von Schwarzhoff, himself declared that he had been misunderstood, and that he had not denied that the money spent upon armaments could be applied to other and perhaps more benevolent purposes.

[1] Umfried, op. cit., p. 12 et seq. Umfried asserts that the above idea has already obtained the approval of a number of progressive statesmen. Thus Naumann has expressed himself in favour of the transfer of the idea of the trust company to international relations ; he calls the trust company the basic method of association at the present day, because it implies the abolition of competition without formal surrender of

It is my belief that the development will actually come about in accordance with this programme. For this programme is entirely in keeping with federal relations, and the beginning of the world federation has, indeed, long since been made, as I think I have proved irrefutably in this book. What is to be the size of the armament of each individual state we cannot undertake to examine here. The question is not so difficult as it may seem at first sight,[1] since in the first place it merely depends upon preventing a further rapid growth of armaments, so that in the agreements to be entered into the states can keep, as far as possible, to the existing and traditional situation, possibly to the appropriations made up to that time, and then later on they can see how to proceed further. Rules of this kind, adopted into the basic treaty of the world federation, would in no way violate the sovereignty of the members of the federation, since they, like the entire federation, are based upon the free contractual will of the parties. Least of all need these rules be frustrated by the fact that a conflict would result between the international provisions concern-

independence. Likewise, the well-known statesman, Gothein, has called attention to this method of disarmament, and Bebel also has advanced the idea that the states should be guaranteed their *status quo* and then appropriations be kept within the last budget.

[1] The German Imperial Chancellor, von Bethmann-Hollweg, in his well-known address delivered in the spring of 1911, emphasizes this difficulty as an argument against the whole idea. He said: 'A sort of precedence must be established. . . . I was obliged to reject such a formula which would set up an international areopagus.' In the *Friedenswarte* of 1912, pt. 3, p. 91 et seq., Wehberg very properly calls attention to the fact that the same government which here rejects a classification of the states had, at the Second Hague Conference, proposed to the other governments the recognition of such a classification in the distribution of seats upon the Prize Court and the Judicial Arbitration Court.

ing the size of a state's armament and its own national laws. Since the treaties in question would come within the jurisdiction of the imperial legislature, they could only be concluded with the approval of the Bundesrat, and would then be laid before the Reichstag for its acceptance, so as to give them national validity.[1] The national laws would then be modified so as to bring them into conformity with the international treaty. But no one, I think, believes that a political aim of such importance as the limitation of armaments can be considered impracticable merely because of the wholly unfair legal inference that a conflict between international and national law would result.[2] Will German national law remain unaltered by the International Prize Court or by an international supreme court for disputes arising out of international private law, as has been officially proposed by Germany ?

At all events a change of this kind in respect to the armaments of the nations is not to be brought about in a day, and this fact urges upon us the consideration as to what less significant steps can even now be taken in order to obviate to some extent at least the evil of the rivalry in armaments and the consequent growing international

[1] See Article 11, paragraph 3, of the Imperial Constitution.

[2] The above view, that an international agreement upon armaments would be inconsistent with national legislation, was strongly emphasized also by Gross von Schwarzhoff in his great speech at the First Hague Conference. A later generation cannot but be astonished that this military delegate, who showed such strong opposition, and that upon wholly inadequate grounds, to the high aims of the First Hague Conference, should receive as a reward the honorary degree of doctor of laws, while, as has already been pointed out, no university in Germany has been found to confer the honorary degree upon any of those individuals who have made possible the work of The Hague and thus rendered the greatest service to the progress of law in the history of mankind !

tension. This brings up the problem of individual treaties between rival states,[1] the prohibition or the limitation

[1] I have already expressed myself in favour of the conclusion of such individual treaties in my *Organisation der Welt*, p. 76 et seq. In the same volume is also to be found a refutation of the earlier common statement that treaties of this kind involved an impossible limitation of sovereignty, on the ground that sovereignty is in truth merely the unrestricted commercial capacity of the state, which will not be taken away by such treaties, but rather manifested. Immediately after the recent Morocco affair, when the German arming against England was at its highest point, I called attention, in an article in the *Christliche Welt*, 1911, no. 45, to the very great possibilities of political advantage to be obtained by advancing further towards the pacifist ideas of the other nations, e.g., in the question of the limitation of armaments, and I added that a modern diplomat must, in my opinion, say to England : 'What shall we receive if we build no ships for three years ?' There followed, then, at the beginning of the year 1912, negotiations between the British and German governments, which are not yet ended, and which appeared to proceed in fact upon the basis which I had in mind. It is true that in the meantime the army and navy bills of the German Empire brought about an increase instead of a reduction of ship-building. Nevertheless it was interesting to state that as a result of those negotiations even conservative organs, which had previously rejected the idea of a contractual agreement upon naval armaments, now approved of it in principle. Thus the *Deutsche Tageszeitung* recommended such an agreement if England would agree by treaty to be satisfied with an excess of 50 per cent. in naval strength, and similar views were expressed in an article in the *Deutsche Revue*, February, 1912, p. 129, and by Rear-Admiral Schlieper in the *Tag* of February 11, 1912. We see, then, that the idea of an individual agreement with England as to armaments has made undeniable progress in Germany; it is no longer rejected in principle, but the relative percentage is discussed. Moreover, the negotiations with England have not yet ended, and if they have unfortunately not begun with an agreement upon the limitation of naval construction, they may end with such an agreement or have it as an indirect result. England has expressed before all the world her willingness to take such action. In a great speech delivered on March 18, 1912, the British Secretary of the Navy, Mr. Churchill, spoke as follows : 'Take, as an instance of this position I am putting forward for general consideration, the year 1913. In that year, as I apprehend, Germany will build three capital ships, and it will be necessary for us to build five in consequence. Supposing we were both

of aerial warfare,[1] the abolition of the capture of private property of the enemy at sea, the conclusion of uncon-

to take a holiday for that year and introduce a blank page into the book of misunderstanding; supposing that Germany were to build no ships that year, she would save herself between six and seven millions sterling. But that is not all. In ordinary circumstances we should not begin our ships until Germany had started hers. The three ships that she did not build would therefore automatically wipe out no fewer than five British potential super-dreadnoughts. That is more than I expect they could hope to do in a brilliant naval action. As to the indirect results within a single year, they simply cannot be measured, not only between our two great brother nations, but to all the world.' To assert that an explicit or implicit agreement upon this or a similar basis is to be permanently impossible would, in my opinion, be to despair of human reason. It is gratifying that no less a person than the Secretary of the Imperial Navy recently declared in the budget commission of the Reichstag that he favoured a naval agreement with England which would not impair the German fleet as a defensive arm. Progress is therefore being made. H. Wehberg has done a good work in bringing to light a group of older treaties upon the limitation of armaments. See his article in the July number of the *Friedenswarte*, 1911, supplemented in the first number of 1912, p. 26.

[1] The prohibition, or at least the limitation, of aerial warfare was forcibly discussed at the meeting of the Institute of International Law at Madrid in 1911. The English jurists, Westlake and Holland, were in favour of the unconditional prohibition of aerial warfare of every kind, as was also the Belgian, Rolin; whereas the French, with Fauchille at their head, were in favour of unrestricted liberty in this respect. Others advocated a compromise which would prohibit horizontal warfare and permit vertical warfare. L. von Bar proposed that the employment of military air-ships for war purposes should be permitted only as a means of making communications and obtaining information. He rightly urged that the advantages of such warfare were out of all proportion to the injury to neutral air-ships, to the enormous cost of an aerial fleet, and to the danger to the state itself from the fall of a military air-ship, together with its guns and cargo. But, unfortunately, instead of this proposal the Institute adopted the following one: 'Aerial warfare is to be permitted in so far as it does not involve greater danger to non-combatants and their property than land or maritime warfare.' That is but little gained. See the proceedings of the Institute in the *Annuaire de l'Institut de Droit international*, 1911, vol. xxiv, Paris.

ditionally obligatory arbitration treaties between two individual states,[1] the mutual guarantee of the territorial *status quo* by smaller groups of states, and other such problems which we must refrain from discussing in detail here. We content ourselves rather with stating the fact that the development of the world federation, the beginning of which has already been made, must also bring about a peaceful settlement of the problem of the limitation of armaments, and that for this very reason we must hasten this development as far as possible.

This brings us to the end of the questions we have undertaken to discuss. The German Imperial Chancellor has recently spoken of the ardent desire of our people for new and higher ideals, and rightly so, for the younger generation cannot live upon the memory of the age of German unity. If our people, if in particular our nationalist middle classes, will follow these high ideals, they are here before us.

[1] In the editorial column of Niemeyer's *Zeitschrift für internationales Recht*, January, 1912, p. 317 et seq., H. Wehberg gives us an interesting discussion of the existing arbitration treaties, with a systematic survey of the reservations contained in them, apropos of a publication of the International Bureau of the Hague Permanent Court of Arbitration containing such treaties (*Traités généraux d'arbitrage*, Martinus Nijhoff, The Hague, 1911).

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